TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~270~~ 111

ROBERT SHIELDS, JAMES D. TEST, ET AL., APPELLANTS,

vs.

AARON ROOT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED APRIL 6, 1868.

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1 UNITED STATES OF AMERICA, TERRITORY OF NEBRASKA,
First Judicial District, County of Douglas, ss:

Pleas before the judge of the District Court of the first judicial district within and for the county of Douglas and Territory aforesaid.

Be it remembered that on the first day of May, A. D. 1863, Aaron Root filed in the office of the clerk of the District Court of Douglas county his bill of complaint against Robert Shields and others, which said bill of complaint is in words and figures following, to wit:

2 In Chancery.

To the Honorable William P. Kellogg, judge of the District Court of the Territory of Nebraska, for the first judicial district and county of Douglas:

Humbly complaining, shows unto your honor, your orator, Aaron Root, of the city of Omaha, in the said county of Douglas, and Territory of Nebraska, that in the summer of the year one thousand eight hundred and fifty-four, James A. Jackson, and divers other persons to your orator unknown, having associated themselves together as a joint stock company, under the name and style of the Omaha City Company, selected, occupied, and surveyed into lots, blocks, and streets, as a town, certain portions of the public lands as and for the site of a town, and as an addition to the said city of Omaha, a part of which land so by them selected, occupied, and surveyed, was a certain tract known and described as follows; that is to say, the west half of the southwest quarter of section ten, (10,) and the north half of the northwest quarter of section fifteen, in township number fifteen north of range number thirteen (13) east of the sixth principal meridian.

3 And your orator further shows unto your honor, that the said company made and issued to divers persons certificates in writing, whereby it was by said company certified, that the person or persons to whom the same were respectively issued, or their assigns, should and would be entitled to receive a deed or deeds of and from the said company of a certain number in said certificates respectively specified of the lots into which the said lands were divided as aforesaid, to be selected, designated, and set apart for that purpose by said company, according to certain regulations in that behalf by it made and established.

And your orator further shows unto your honor, that on the first day of September, one thousand eight hundred and fifty-five, Robert Shields, late of the county of Sarpy, in said Territory of Nebraska, was the assignee and holder of a certain one, numbered 416, of the certificates so as aforesaid issued by the said company, by which, and by the terms thereof, he was entitled to have and receive a deed or deeds of and from said company, conveying to him twenty of the lots into which the lands aforesaid had been divided and surveyed as is above stated; that on the fourth day of September, in the year last aforesaid, the said company made a distribution of said lots to

and among the several assignees and holders of its said certificates; that in and by said division and distribution, the said Shields, as an assignee and holder of the aforesaid certificate, became and
4 was entitled to have and receive from the said company a deed conveying to him, among others, certain lots, parts of the lands first above described, numbered and known as follows; that is to say, lots six, seven, eight, nine and ten in block number one hundred and twenty-eight and a half, (128½,) and lots six, seven, eight, nine and ten in block forty-six and a half; and accordingly the said company, by its officers duly appointed and empowered in that behalf, on the sixteenth day of October, in the year last aforesaid, by its deed bearing date on said day, conveyed to said Shields the said lots, as by the record thereof duly recorded in the register's office of said county of Douglas will on reference appear.

And your orator further shows unto your honor that, at, in and by the aforesaid distribution of the aforesaid lots by the said company made, the said Shields, as the assignee and holder of the other of the two aforesaid certificates, became and was entitled to, and did have and receive of and from the said company a deed, conveying to him five several other of the aforesaid lots, but your orator is not informed of the numbers thereof; that at, in, and by the said distribution of said lots, one James C. Mitchell, as the assignee and holder of one of the said company's said certificates, became and was entitled to, and did receive and have of and from the said company a deed, conveying to him certain lots, parts of the lands first above described, numbered and known as lots eleven, twelve, thirteen, four-
5 teen and fifteen in said block one hundred and twenty-eight and a half; that on or about the fifteenth day of October, in the year last aforesaid, the said Shields and the said Mitchell made between them an exchange of certain of their said lots, as by the record thereof duly recorded in said register's office in book A, at page 430, will on reference appear; and accordingly the said Mitchell, by his deed of exchange and conveyance bearing date on the day last aforesaid, conveyed his five lots in said block, numbered eleven, twelve, thirteen, fourteen, and fifteen, to said Shields, as by the record thereof duly recorded in the office of the register of said county of Douglas, in book B, at page 225, will on reference appear, and said Shields, by his like deed, conveyed to said Mitchell the lots above numbered in said block forty-six and a half.

And your orator further show unto your honor, that shortly after the day last aforesaid, but on what particular day is to your orator unknown, the said Shields, under and by virtue of the deed so as aforesaid made to him by said company, conveying to him said lots numbered six, seven, eight, nine, and ten in said block one hundred and twenty-eight and a half, and under and by virtue of the deed so as aforesaid made by said Mitchell, conveying to him said lots numbered eleven, twelve, thirteen, fourteen, and fifteen in said block, entered into the same and became and was possessed thereof; that immediately thereupon he constructed a fence upon the lines
6 of said lots and the several streets by which the same were

bounded; that he built on said lots a house in which he lived with his family some time in the spring of the year then next ensuing; that, as your orator is informed and believes, divers other persons in like manner, and under and by virtue of like deeds to them made by said company, entered into, became, and were possessed of, built upon, and inhabited divers other lots into which the said lands were so as aforesaid divided; that the said Shields, as well as said divers other persons, severally became and were so as aforesaid possessed of and occupied said lots as a part of the said city of Omaha, and as lands selected as the site of a town, and he neither had, nor until the day in that behalf hereinafter mentioned, did he at any time, publicly or legally, or otherwise, claim that he had any right, title, interest, claim, or demand of, in, to, or upon the lands first above described, save only the lots so as aforesaid conveyed to him.

And your orator further shows unto your honor that on or about the twenty-fourth day of June, one thousand eight hundred and fifty-six, the said Shields sold said lots, together with the appurtenances, to one John Beeson, for the sum of eleven hundred dollars, by the said Beeson to him paid therefor, and thereupon, by his deed
7 of conveyance, bearing date on said day, he, the said Shields, conveyed the said lots with the appurtenances to the said Beeson, therein and thereby covenanting and agreeing to and with the said Beeson that he would warrant and defend said premises against all persons lawfully claiming the same, save only the United States, as by the record thereof recorded in the office of the register of said county, in book C, at page 4, will on reference appear; that the said Beeson under and by virtue of said deed entered into and became possessed of said lots, and thereupon the said Shields, with his family, removed to and inhabited another house in said city of Omaha, a great distance, to wit, one mile and more from said tract, in which last-mentioned house he with his family continued to reside until the summer of the year one thousand eight hundred and fifty-seven.

And your orator further shows unto your honor, that from the day first aforesaid until the summer of one thousand eight hundred and fifty-seven, the said Shields was extensively engaged in mercantile pursuits in the said city of Omaha, but in the said summer, he having become embarrassed in his pecuniary affairs, suspended the said mercantile business, and removed from said city to certain lands in the county of Sarpy, in said Territory of Nebraska, known and described as follows; that is to say, the southeast quarter of section ten in township thirteen north of range ten east of the sixth principal meridian; that in said summer he settled upon said lands, and erected a dwelling thereon, which he with his family inhabited, and otherwise improved said lands; and afterwards and within the period limited by law for that purpose, but on or about the fifteenth day of July,
8 in said year, he, the said Shields, filed with the register of the Omaha land district—that being the district in which the said lands were situate—his written statement describing the lands so by him settled upon, and declaring his intention to claim the same under the provisions of an act of the Congress of the United States,

entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," approved September 4th, 1841. And your orator further shows unto your honor, that the tract of land first above described became and was and is included within the corporate limits of the city of Omaha, by an act of the legislature of this Territory, entitled "An act to incorporate the city of Omaha," approved February 14, 1857, as by said act reference being had thereto will appear.

And your orator further shows unto your honor, that on or about the twenty-second day of September, one thousand eight hundred and fifty-seven, the said Shields became and was seized in fee simple of, or otherwise well entitled to, certain lands and premises situate in the said county of Sarpy, and known and described as follows; that is to say, lot number one (1) in section number five, (5,) containing thirty-two (32) acres, and the southwest quarter of section number eleven, (11,) and the southeast quarter of section number ten, (10,) all in township number thirteen north of range number ten east of the sixth principal meridian, and also lots number five (5) and seven, (7,) and the southeast quarter of the southeast quarter of section number thirty-two, (32,) in township number fourteen (14) north of the said range, containing ninety-nine (99) acres; that on said day,
9 and thence until a recent day, to wit, within one year last past, he continued to be seized of and to reside on said premises, a short interval hereinafter stated alone excepted.

And your orator further shows unto your honor, upon information and belief, that on or about the first day of September, in the year last aforesaid, James D. Test and Jefferson P. Cassady, both of the county of Pottawattamie, in the State of Iowa, one or both of them, entered into an agreement with said Shields, the terms of which are to your orator unknown, save that as your orator charges and avers it was by and on the part of said Test and Cassady, one or both of them, agreed that they or he should purchase, or should advance to the said Shields the funds with which he should repurchase from said John Beeson, the aforementioned lots six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen and fifteen, in said block one hundred and twenty-eight and a half; and on the part of said Shields it was agreed that thereupon he should remove from his aforesaid lands and his home in Sarpy county, to and into the house so as aforesaid by him built on said lots, and that he would and should thereupon claim that he, on or about the first day of April, one thousand eight hundred and fifty-six, became and was entitled to, and that he did then in fact claim the lands first above described, under and by virtue of the act of the Congress of the United States above entitled, approved
10 September 4th, 1841; that under and by virtue of said act he should pre-empt said lands of and from the United States, and that thereupon he should and would convey to the said Test and Cassady, or one of them, or to such person as they should for that purpose appoint, the said tract of land, and the undivided one-half of the first aforementioned lots, in fee as and for the payment and satisfaction of the money so as aforesaid by the said Cassady and Test, both

or one of them, paid or advanced for the repurchase from the aforesaid Beeson of the said lots, as in that behalf is herein before stated.

And your orator further shows unto your honor, upon information and belief, that in pursuance of the said agreement so as aforesaid, by and between the said Test and Cassady of the one part and the said Shields of the other part, made and entered into, and on or about the day last aforesaid, the said Cassady and Test, or one of them, or the said Shields, with funds for that purpose as aforesaid advanced to him by said Cassady and Test, or one of them, repurchased the said lots from the said Beeson, for the sum of two thousand dollars to him paid therefor, whereupon the said Shields removed from his aforesaid lands and home in Sarpy county to and into the house so as aforesaid by him built on said lots; that he erected no new dwelling on the said lands, a small and rude shed alone excepted, nor did he further improve the same, but by reason of, and under his former residence thereon, as is hereinbefore stated, he claimed to be entitled to,

11 and endeavored under and by virtue of the act of Congress aforesaid, to enter the aforesaid lands with the aforesaid register.

And your orator further shows unto your honor, that on or about the first day of November, in the year last aforesaid, upon the application in that behalf by the said Shields made to him, the said register refused to permit the said Shields to enter said lands, for the reason among others that the same were a part of the public lands which had been, as is above stated, selected as the site of the said city of Omaha, and were included within the corporate limits thereof; whereupon the said Shields did promise and agree to and with the said register, that if permitted so as aforesaid to pre-empt said lands, he would thereafter, and whenever thereunto requested, convey the lots severally claimed by each to the persons respectively who claimed to be owners thereof; and that the said Shields did then and there further and in like manner promise and agree to and with divers owners and claimants of said lots, that if permitted without objection interposed by them to as aforesaid pre-empt said lands, he would thereafter and whenever by them thereunto requested, convey to them respectively the several lots owned or claimed to be owned by them.

12 And your orator further shows unto your honor, that by means of the promises and agreements so as aforesaid by the said Shields made, as well to the said register as to the divers persons aforesaid, owners or claimants of said lots, he, the said Shields, induced that officer to entertain his application to pre-empt said lands, and the said owners and claimants of said lots to withhold their objection and opposition to such his entry thereof; and accordingly, and on the twenty-first day of November, one thousand eight hundred and fifty-seven, the said Shields made proof, ex parte, which was satisfactory to the said register and receiver; that on or about the first day of April, one thousand eight hundred and fifty-six, he settled in person on said tract; that he had erected a dwelling thereon, and inhabited the same, and had largely improved the same, as is by the above-entitled act of Congress required; that he further made oath to such

matters as are by said act required to be sworn to by persons claiming the benefit of said act before they are allowed to enter lands under the same; that is to say, that he had never had the benefit of any right of pre-emption under said act; that he was not the owner of three hundred and twenty acres of land in any State or Territory; that he had not settled upon or improved said tract to sell the same on speculation, but in good faith to appropriate the same to his own use and benefit, and that he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he should acquire from the government of the United States should enure to the benefit of any person except himself; that thereupon said Shields paid to the said register the minimum price established by law for said lands, whereupon that officer made and issued to him the usual duplicate receipt for the money so paid by him, and the said register made for him and for his use the usual patent certificate for said lands.

13 And your orator further shows unto your honor, that immediately after the said Shields had so as aforesaid entered the said lands, to wit, on the twenty-third day of November, in the said year, he, together with Margaret J., his wife, in pursuance of his aforementioned agreement with the said Cassady and Test, or one of them, by his deed of conveyance, bearing date on said day, for the consideration, as your orator charges as above stated, and no other, although the consideration in the said deed expressed was ten thousand dollars, granted, bargained, sold and conveyed to the said Test the undivided half of said premises, as by the said deed which your orator alleges is in the possession or under the control of the defendants hereinafter named, some or one of them, and which your orator prays may be set forth fully and truly in their or his answer to this bill of complaint, or may be produced and submitted to your orator's inspection, as this honorable court shall direct, will on reference appear.

And your orator further shows unto your honor, that shortly after the day last aforesaid, to wit, on the fifteenth day of December, in the said year, the said Test and Cassady, one or both of them, sold, and by the said Test, his deed of conveyance, bearing date on said day, made to John F. Baldwin and George M. Dodge, both of the said county of Pottawattamie, in the said State of Iowa, for the

14 consideration as therein expressed, of five thousand dollars, granted, bargained, sold and conveyed the undivided one-fourth of the first above-described premises, and the undivided half of the said lots; and that at or about the same time, he, the said Test, or the said Cassady and Test, both or one of them, also sold to said Baldwin the other undivided half of the ten lots above numbered, which still remained unconveyed by said Shields, and on the second day of December, in said year, the said Shields, together with the said Margaret J., his wife, by their deed of conveyance, bearing date on the said day, upon the direction, and upon and by the appointment of the said Cassady and Test, one or both of them, in that behalf, conveyed to the said Baldwin the undivided half of the said ten said lots

as aforesaid, all which will more fully and at large appear on reference to said deeds, as well the said deed made by said Test, as the said deed made by said Shields, both which deeds, as your orator alleges, are in the possession or under the control of the defendants hereinafter named, some or one of them, and which your orator claims may be fully and truly set forth in their or his answer to this bill of complaint, or may be produced and submitted to your orator's inspection, as this honorable court shall direct.

And your orator further shows unto your honor, that on the
15 twenty-sixth day of January, one thousand eight hundred and fifty-eight, the said Shields sold, and by his deed of conveyance, bearing date on said day, conveyed to Evert V. Smith, of the said county of Douglas, in this Territory, for the consideration therein expressed of three thousand dollars, the undivided half of the first above-described premises, the aforesaid ten lots being excepted and reserved out of the same, in and by which said deed the said Shields did covenant and agree to and with the said Smith, his heirs and assigns, that he would warrant and defend the said premises against the lawful claims of all persons whomsoever; as by the said deed which your orator alleges is in the possession or control of the defendants hereinafter named, some or one of them, and which your orator prays may be set forth fully and truly in their or his answer to this bill of complaint, or may be produced and submitted to your orator's inspection as this honorable court shall direct, will on reference appear.

And your orator further show unto your honor, that at or about the last day aforesaid, the said Shields removed from the premises first above described, and returned to his aforesaid lands in the county of Sarpy; that he continued to reside on said lands until a late
16 day, to wit, within one year last past, when he removed from this Territory to some place unknown to your orator.

And your orator further shows unto your honor, that the corporate authorities of the said city of Omaha, and divers persons owning or claiming to own sundry of the lots into which the aforesaid lands were surveyed, as is above stated, having become advised of the entry of the said lands made with the said register by said Shields thereupon, but on what particular day your orator is not informed, exhibited in the General Land Office of the government a caveat against the right of said Shields to said lands so by him claimed as aforesaid, wherein, among other things, it was, as your orator is informed and believes, alleged that the said shields has not settled upon, inhabited, or improved said lands under or by virtue of the above-entitled act of Congress, nor as by the provisions of that act is required, as he had so as aforesaid falsely and fraudulently alleged, and proved before the said register and receiver, that the said lands were included within the corporate limits of the said city of Omaha, before and at the time he settled on said lands for the purpose of pre-empting the same under said act; that he had settled upon the same to sell the same on speculation, and not to appropriate
17 the same to his own exclusive use or benefit; that he had

directly made an agreement with some person or persons by which the title which he should acquire from the government of the United States should enure in part to the benefit of said persons and not himself; that such proceedings were thereupon had by and before the honorable Commissioner of the General Land Office, that he, on the sixth day of March, one thousand eight hundred and fifty-eight, by his official letter of that date, addressed to the said register and receiver, directed them, after due and reasonable notice in that behalf, to be by them first given to said Shields, and the said corporate authorities of said city to reinvestigate the right claimed by the said Shields to pre-empt the said premises under the aforesaid act, and report at length to him, the said Commissioner, the testimony which should be offered and adduced before and taken by them, and their findings of law and of fact thereon, and all other proceedings which should be by or before them had in the premises.

And your orator further shows unto your honor, that on or about the fifth day of May, in said year, the said Cassady, Test, Baldwin, and Smith, either personally or by their counsel, and in the name of the said Shields, he not being present, nor in any manner participating in that matter, and the corporate authorities of the said city of Omaha, in pursuance of the notice and appointment of the
18 aforesaid register and receiver, appeared before the said receiver at the said land office, (the said register declining to set in said matter because he had been of cousel for said Shields,) and then and there the said parties produced a large number of witnesses, as well to establish as to disprove the right of said Shields to pre-empt the said premises; that upon and by the examination and testimony of said witnesses, protracted to a great length, the facts as to the original settlement and the erecting of a dwelling and the improving and inhabiting of said premises by said Shields, as to his settlement and erecting a dwelling upon and improving and inhabiting, and claiming, under and by virtue of the aforementioned act, certain lands in Sarpy county, as to his contract with other persons by which the title which he should acquire by said entry should enure in part to their benefit, and as to said lands having been selected as the site of a city, and included within the corporate limits of the said city of Omaha, substantially as the same are herein before stated, were proved and established indisputably without material contradiction by or between said witnesses, as well those produced in behalf of and those produced adverse to the rights claimed on behalf of said Shields, as by the record of the said evidence remaining in the Land Department of the government, reference being thereunto had, will more fully appear.

19 And your orator further shows unto your honor, that on the fifth day of June, in the said year, the said receiver having carefully and maturly considered the said testimony, and the matters alleged and proven before him by the said parties respectively, was constrained to, and did by his official letter of that date, report to the said Commissioner that the said Shields was not entitled to pre-empt the said lands, for the reasons following; that is to say, that

the said lands had been selected as a site for a city, and were included within the corporation limits of the city of Omaha; that said Shields did not in April, one thousand eight hundred and fifty-six, settle upon, or improve, or inhabit, or build a house on said premises with the view of pre-empting the same under said act, and that the entry so as aforesaid made by said Shields was not for his benefit, but for the benefit of other persons and parties, and the said receiver recommended that the said entry be cancelled, as by the record of the said letter remaining in the office of the register of the said land office will on reference more fully appear; that with the said letter the said receiver enclosed and forwarded to the said Commissioner a full and complete record of the testimony so as
20 aforesaid taken, and of all proceedings in the said matter had before him, together with the arguments of the counsel of the respective parties.

And your orator further shows unto your honor, that on or about the day last aforesaid, said Shields, before and in the office of the said receiver, and thence afterwards at all times in the Land Department of the government, maintained the validity of the said entry so as aforesaid made by said Shields, he at no time and in no manner being present or participating in or being cognizant of such their proceedings, or any thereof in the premises, but the said Commissioner, having duly considered the aforesaid report of the said receiver, the record of said testimony and of said proceedings, and the arguments of the counsel, as well as said C., T., S., and B., as the said city of Omaha, approved and affirmed the said report, and the conclusions and recommendations therein contained, and thereupon cancelled the said entry, and by his official letter bearing date the twelvth day of January, one thousand eight hundred and fifty-nine, addressed to the said register and receiver, informed them of his action in the premises, and ordered them to note the fact that he had so cancelled said entry on their book and plats, which was thereupon by them accordingly done.

And your orator further shows unto your honor, that thereupon, and on the day last aforesaid, the said Cassady, Test, Smith, and
21 Baldwin, in the name of the said Shields, but in fact on their own behalf, appealed from the decision of the said Commissioner, to the Honorable Secretary of the Interior, Thompson; that that officer, upon full and mature consideration of the testimony aforesaid, the argument of counsel, and the reports and opinions, as well of the said Commissioner as of the said receiver, approved and affirmed the opinions, conclusions, and orders aforesaid of those officers, as by the record thereof remaining in the Land Department of the government, reference being had thereunto, will more fully appear.

And your orator further shows unto your honor, that on the fifteenth day of May, one thousand eight hundred and sixty, the said Commissioner, by his official letter of that date, directed the said register and receiver, after due notice in that behalf, to sell at public auction the said lands, the same being an isolated or disconnected tract, and never having been offered at public auction; that the

said register and receiver, having given such notice as directed by the said Commissioner and the statute in such case made and provided, on the tenth day of July, one thousand eight hundred and sixty, exposed the same for sale at public auction; that Gilbert C. Monell, of the city of Omaha afor'd, attended the said sale, and then and there, upon certain tracts hereinafter mentioned, became and
22 was declared to be the best bidder and purchaser of a certain portion of said premises, namely, the west half of the southwest quarter of section number ten, in the township and range aforesaid, at and for the price and sum of one dollar and twenty-five cents per acre; that the said Monell paid to the said receiver the sum so by him bidden, and thereupon the said receiver made and issued to him his usual duplicate receipt for the money so by him paid, and the said register made to and for him and his use his usual patent certificate for said lands.

And your orator further shows unto your honor that the said Monell, so as aforesaid, attended said sale and became the purchaser of the last above-described lands as the agent and trustee of the said city of Omaha, and of the several persons who owned or claimed to own lots into which the same had so as aforesaid been surveyed, in and upon the trust then and there by him declared to convey said lots to said persons, they first reimbursing him the expenses to which he had been subject in purchasing the said premises as aforesaid, and to sell the remaining or some portion or portions of said lands on account of the said city of Omaha; that for the more convenient sale and conveyance by him of said lots and portions of said lands, the said Morell procured a resurvey of said lands to be had, and
23 a plat thereof accordingly made, which plat was on the nineteenth day of November, in the year last aforesaid, recorded in the office of the register of said county, in book of deeds M, at page 642, as by the same remaining on file in said office and the said record thereof, reference being had thereunto, will more fully appear.

And your orator further shows unto your honor, that your orator held mediately from the aforesaid Omaha City Company, by divers deeds, the title of said company to divers lots in the lands so by said Monell purchased as aforesaid, and was of the class of persons for and in trust for whom he so purchased the same, which said lots upon the plat of said lands, so as aforesaid by said Monell made and recorded, were known and numbered as follows; that is to say, one, two, three, four, five, six, seven, eight, nine, ten, and eleven, in block three; that in execution of his said trust the said Monell, together with Lucinda, his wife, on the twentieth day of November, in the said year, by their deed of conveyance bearing date on said day, and for the consideration of three dollars by your orator to said Monell paid therefor, conveyed to your orator in fee certain of the said lots, namely, lots one, two, three, four, five and six, in said block three; and the said Monell, in and by his said deed, covenanted and agreed to and with your orator, that he, the said Monell, was siezed
24 by a good and indefeasable estate of inheritance of, in, and

to said lots, and had good right and lawful authority to convey the same, and that he would warrant and defend the same against the lawful claims of all persons lawfully claiming or to claim the same by, through, from, or under him.

And your orator further says that afterwards, and on the thirty-first day of January, in the year one thousand eight hundred and sixty-one, the said Monell in like manner, and for further consideration of four dollars and fifty cents, conveyed to your orator the said lots seven, eight, nine, ten, and eleven, therein and thereby covenanting and agreeing to and with your orator in manner as is hereinbefore stated, as by the said two several conveyances in your orator's possession, and ready to be produced as your honor shall direct, will on reference appear.

And your orator further shows unto your honor that on the day last aforesaid your orator purchased of and from the said city of Omaha, for the agreed price and sum of nineteen hundred and eighty dollars, which your orator paid to said city therefor, five several other pieces or parcels of the lands, so as aforesaid by the said Monell purchased, the same being known and described as out-lots eleven, twelve, thirteen, fourteen, and fifteen; and on said day the said Monell, together with Lucinda, his wife, upon and by the direction and appointment of the said city of Omaha in that behalf, by his
25 deed of conveyance of that date, conveyed to your orator in fee the said out-lots in and by his said deed, covenanting and agreeing to and with your orator in like manner and in all respects as in and by his aforesaid deeds he had covenanted and agreed, as by the said deed of conveyance in your orator's possession, and ready to be produced as your honor shall direct, will on reference appear.

And your orator further shows unto your honor that afterwards, and on or about the day and year last aforesaid, under and by virtue of the three several grants and conveyances by the said Monell made to your orator, your orator entered into the several lots and out-lots in the said three several deeds described, and thereby became and was seized thereof in his demesne as of fee; and being possessed thereof as aforesaid, your orator erected and made thereon divers large, substantial, and permanent improvements, to the amount and of the value of two thousand dollars, as follows; that is to say: your orator constructed around and through said premises a substantial fence; and also built thereon a house, the main part of which is eighteen feet by twenty-four feet in size, with a kitchen added thereto sixteen by sixteen feet in size, and with a wood-house eighteen by twelve feet, with a stoned cellar underneath the same; a barn twenty-four feet square; a wagon house sixteen by eighteen feet, and a cow shed.

26 And your orator further shows unto your honor, on information and belief, that pending the nogociation between the said city and your orator for the purchase and sale of the out-lots above enumerated, the said Shields, Test, Cassady, Smith, and Baldwin were, and each and every one of them was, well advised that the said city and your orator were treating in that behalf, and that at and before

the making of the improvements on the said premises, as aforesaid, by your orator, the said parties were, and each and every one of them was, well advised thereof; yet the said parties, each and every of them, concealed from your orator that they, or any or either of them, had or claimed any right, title, interest, or demand of, in, to, or upon the said premises or any part thereof, although your orator was, and thence until long after said improvements were made continued to be, as they and each and every of them well knew, totally ignorant thereof.

And your orator further shows unto your honor that on or about the 13th day of December, one thousand eight hundred and sixty-one, the Honorable Secretary of Interior, Caleb B. Smith, in violation of the well-settled course and practice of the Land Department of the government, assumed to review and reconsider the decision of the Honorable Secretary of the Interior, Thompson, his predecessor in office, so as aforesaid made and acted upon, and in utter violation of the law of the land as applicable to the said matter, and without a fair regard to the testimony so as aforesaid taken before the aforesaid receiver, upon the re-examination of the right of said Shields
27 to pre-empt the lands first above described, and without any notice to your orator, or the said city of Omaha, or the said Monell; and, in utter and violent disregard of their rights in the premises and of common justice, summarily assumed to reverse the decision of his said predecessor, and ordered and caused the purchase of the said premises made by the said Monell, as aforesaid, to be cancelled, annulled, and altogether held for and made nought by the said Land Department, and the entry so as aforesaid made by the said Shields on the twenty-first day of November, one thousand eight hundred and fifty-seven, to be reinstated and restored to and into the same plight the same was in on said day.

And your orator further shows unto your honor that the said city of Omaha and your orator, having become advised of the aforesaid decision and acts of the said Secretary of the Interior Smith and of the said Land Department, the said Monell on their behalf exhibited before the said Secretary his caveat against the issue of the usual letters patent to said Shields for the said lands, showing therein that the entry thereof by him made was illegal, fraudulent, and void, and praying to be let in to be heard in maintenance of his, the said Monell's, aforesaid purchase; yet the said Secretary, disregarding his duty in the premises and in violation of the just rights as well
28 of the said city of Omaha and your orator as of said Monell in the premises, refused to entertain or consider the matters and things so alleged before him, and ordered that the said letters patent should issue to the said Shields for the said lands.

And your orator further shows unto your honor that the aforesaid Jefferson P. Cassady and Nathan P. Dodge, of the county of Pottawattamie, in the State of Iowa, by virtue of deeds of conveyance to them respectively made, mediately or immediately, by and from the said Test, claim to have an undivided interest in the premises first above described, and that Eldrich Smith, by virtue of a deed or deeds

of conveyance to him by the aforesaid Evert V. Smith made, claims to have, become, and be entitled to the premises so as above stated conveyed by said Shields to the said Evert V.

And your orator further shows unto your honor that shortly after the said Shields, so as aforestated entered the said premises with the said register, in order to secure to Megrath, Richards & Company, of the said city of Omaha—a partnership formed for the purpose of carrying on business in this Territory—the payment of the sum of money, the amount of which is to your orator unknown, in which he, the said Shields, was indebted to said partnership, deposited and assigned to it by way of equitable mortgage the duplicate receipt made and issued to him by the said receiver at the
29 time he so as aforesaid paid to said receiver the price and sum by the government charged for said lands, which sum still remain unpaid by said Shields to said partnership, and the said receipt still remains in their hands, held by them for the purpose aforesaid, by reason whereof the said firm do claim and insist that the said lands stand and are charged and chargable with the lien and incumbrance in their behalf to the extent of the sum so as aforesaid due and owing to them by the said Shields.

And your orator further shows unto your honor that at the time the said Shields so as aforesaid sold and conveyed to the said Evert V. Smith the undivided one-half of the said premises, the said Smith in part payment of the sum which he was, by the terms, agreements, and conditions of said sale, to pay to said Shields, made and delivered to him his certain promissory note or promissory notes in writing, bearing even date with the aforesaid deed made by said Shields to him, whereby, at a day therein named, but to your orator unknown, he promised to pay a sum of money, certain the amount of which is unknown to your orator; that the said Shields endorsed said note to George M. Mill, of the said city
30 of Omaha, and the said Mills, by virtue thereof, claims that said premises stand and are charged and chargable in his favor with the lien and incumbrance of his said demand.

And your orator further shows unto your honor that James Woods, William T. Christy, Robert K. Woods, William T. Gentry and Joseph Woods, jr., and the copartnership and firm of Woods, Christy & Company, at the term of October, one thousand eight hundred and fifty-seven, in the District Court of this Territory for the county of Douglas, recovered against the said Shields a large sum of money, the exact amount of which is unknown to your orator, and they claim and insist that the same was and is a lien upon the premises above-described, and that the copartnership and firm of Helfinstien, Gore & Company of St. Louis aforesaid, at the term of March, one thousand eight hundred and fifty-eight, recover, in said court against said Shields a further large sum of money, the exact amount of which is unknown to your orator, and they claim and insist the same was and is a lien upon some portion of the premises above described.

And your orator further shows unto your honor, that the honorable Commissioner of the General Land Office, according to the

31 course and practice of his office, on or about the first day of January last past, refused upon application made to him in that behalf to issue the letters patent for said land for and upon the aforesaid entry of the said Shields, until the aforesaid receiver's duplicate receipt of payment for said land was delivered up to the government to be cancelled, or due and satisfactory proof of the loss thereof was made; that the said Cassady, Test, and Baldwin, applied to the aforesaid Megrath, Richards & Co., to surrender the same to them, whereupon that firm refused so to do until the sum so as aforesaid due to them by said Shields was repaid to them, whereupon the said Test, well knowing that the said Megrath, Richards & Co. had, the same as aforesaid, made and upon his corporal oath swore to his certain affidavit in writing, wherein he did falsely and fraudulently state and swear that the said Shields had assigned and delivered the said duplicate to him the said Test, and that he, said Test, in some manner had lost the same, whereas your orator charges the truth to be that the said Shields never assigned or delivered the said duplicate receipt to the said Test, but so as hereinbefore is stated assigned and delivered the same to the said firm of Megrath, Richards & Co.; that the said

32 Cassady, Test & Baldwin, some or one of them, caused the said affidavit to be filed in the General Land Office aforesaid, and thereupon, and in full faith and confidence in the matter therein alleged, the proper officer or officers of the government did, at the special instance and request of the said Cassady, Test & Baldwin, make, issue, and deliver to them, or some or one of them, or to some person for their use, the usual letters patent of the United States, whereby, in virtue and consideration of the entry so as aforesaid by the said Shields made, they granted and conveyed the first above-described lands to him, his heirs and assigns, in fee simple forever, as by the said letters patent which your orator alleges is in the possession or under the control of the defendants hereinafter named, some or one of them, and which your orator prays may be set forth fully and truly in their or his answer to this bill of complaint, or may be produced and submitted to your orator's inspection, will on reference appear.

And your orator further shows unto your honor, that the said Cassady, Test, Baldwin, Dodge and Smith do threaten to bring in this honorable court, setting at law, an action or actions of ejectment to turn your orator out of possession of the premises so as afore-

33 said conveyed to him, and the said Mills, Megrath, Richards & Company, James Woods, William T. Christy, Robert K. Woods, William T. Gentry and Joseph Woods junior, Helfinstien, Gore and Company, some or one of them, do threaten to bring in this honorable court at law or in equity, some action or suit or actions or suits to subject said premises to the payment of their respective demands or some or one of them, and that thereby a cloud will be cast upon your orator's title thereto, and he will be subjected to [to] divers vexations and expensive suits; and your orator well hoped that the party above named, each and every of them, would have desisted from setting up or alleging any claim to said premises, and that they would

have released their several interests to and demands upon the same to your orator, as in equity and good conscience they ought to have done.

But now so it is, may it please your honor, the said Robert Shields, Jefferson P. Cassidy, James D. Test, John T. Baldwin, Grenville M. Dodge, Nathan T. Dodge, Evert V. Smith, Eldrick Smith, George M. Mills, Megrath, Richards & Company, James Woods, William T. Christy, Robert K. Woods, William T. Gentry, Joseph Woods. jr., Heffinstien, Gore, & Company, Gilbert Monell, and
34 the city of Omaha, combining and confederating together and with divers other persons and parties to your orator at present unknown, whose names, when discovered, your orator prays may be inserted herein with proper and apt words, to charge them as parties, defendants to this your orator's bill of complaint, and contriving how to wrong, injure, and oppress your oator in the premises, absolutely refused to desist from such their unjust and inequitable claims and demands, or to release the same to your orator; and at times the said Cassady, Test, Baldwin, Dodge and Dodge do, in excuse for so doing, pretend that at the several times they respectively purchased interests in said premises they had no notice of the fraudulent practices of the said Shields in claiming to be entitled, and in proving before the aforesaid register and receiver his right to pre-empt the said premises first above described, as the same are above stated and set forth, and that they are entitled to the protection of this honorable court as bona-fide purchasers of said interests, without notice of the said fraudulent practices, and for valuable considerations by them respectively paid therefor, the contrary of all which your orators charge to be truth, and says that from the day first above mentioned to the time the said Shields removed from this Territory the said Cassady and Test were in frequent communications with said Shields, advanced him divers sums of money, had either for them-
35 selves or others considerable dealings and transactions with him, were particularly, intimately, and confidentially informed and advised of his business arrangements, plans, and purposes, and long before it was by others residing in the vicinity of and largely interested in the lands in question in this suit, they the said Cassady and Test were informed of and knew Shield's intention to pre-empt said lands in his name, and ostensibly in his behalf, but really and in fact for themselves, applied to the aforesaid register and receiver to learn and be informed if he would be permitted to enter said premises under the act aforesaid; and your orator further charges that they advance the means with which the lots in said block one hundred and twenty-eight and a half were purchased; that as your orator has good reason to and does believe, they, the said Cassady and Test, expressly provided and required with and from said Shields that the aforesaid Beeson should, and he, the said Beeson did accordingly, convey aforesaid lots to them the said Cassady and Test, or one of them, they or one of them did, at the day the said Shields entered said lands as aforesaid, hold the title thereto; and other times the said Cassady, Test, Baldwin, Dodge, Dodge, and Smith

do pretend that the said Shields was not at the time he so as aforesaid entered said lands with the said register the owner of three hundred and twenty acres of land in this Territory, whereas
36 your orator charges the contrary thereof to be the truth, and says that on or about the twenty-second day of September, one thousand eight hundred and fifty-seven, one Francis Edwards was seized in fee of or otherwise well entitled to lot number one in fractional section number five in township thirteen north of range ten and lots number five and seven, and the southeast quarter of the southeast quarter of fractional section number thirty-two, in township 14 N. R. 10, east of the sixth principal meridian; that on or about said day one Richard O'Brien was in like manner seized of or entitled to the southeast quarter of section number eleven in township 13 N. R. 10 E.; and on or about said day one Thomas Hawes was in like manner seized of or entitled to the southeast quarter of sections number ten in the township and range last aforesaid; that on or about said day the said Shields purchased said several pieces or parcels of land from the said parties; that either they were or he were indebted to the said Cassady & Test, or to some person or persons for whom the said Cassady & Test were agents; that the said parties, under the direction of the said Shields, and in order to secure such indebtednesses, conveyed the said several parcels of lands to said Cassady & Test or one of them, or to their said principals, whereupon they, the said Cassaday & Test, or one of them, either in their one name or in the name or names of their said principal or principals,
37 made a writing or writings obligatory, conditioned to convey the said lands to said Shields, or to the said Margaret J. his wife, whenever he the said Shields should pay the aforesaid indebtednesses; wherefore your orator charges and insists that the said Cassady & Test, or one of them, or their aforesaid principal or principals, were trustees for said Shields as to said lands, and so held the title thereto for him charged with the said debts.

All which actings, doings, refusals, and pretenses are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises.

In tender consideration whereof, and forasmuch as your orator is remedless in the premises at and by the strict rules of the common law, and can only have adequate relief in a court of equity where matters of this and the like nature are properly cognizable and relievable; to the end, therefore, that the said Robert Shields, Jefferson P. Cassady, James D. Test, John P. Baldwin, Granville M. Dodge, Nathan P. Dodge, Evert V. Smith, Eldrick Smith, George M. Mills, Megrath, Richards & Co., James Woods, William T. Christy, William T. Gentry, Robert K. Woods, and Joseph Woods, jr., W. Hel-
38 fenstien, Gore & Co., Gilbert C. Monell, and the city of Omaha, and their confederates when discovered, may upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the matters and things hereinbefore stated and charged, and that as fully and particularly as if the same were here repeated, and they thereunto specially and severally interrogated; and

that they so answer, not only to the best and utmost of their respective knowledge and remembrance, but also to the best and utmost of their several and respective hearsay, information, and belief; and especially that the said Cassady and Test, and each of them, may in manner aforesaid set forth and discover whether they or one of them did not know as early as the month of August, one thousand eight hundred and fifty-seven, that the said Shields meditated claiming the first above described lands under the aforementioned pre-emption law, and of entering the same with the register of the aforesaid land office; and if as early as the month of September, in said year, they, the said Cassady and Test, or one of them, did not apply to the officers of said land office to learn, and if they did not learn that said Shields would be by said officers permitted to pre-empt said lands; whether they or either and which of them were or was present at said
39 office at the time the said Shields proved his right to pre-empt said lands; whether they or either of them were or was in said city of Omaha on said day, and saw, or consulted, or conversed with said Shields in regard to his proving his right to enter, and his entering said lands as aforesaid; whether said Cassady and Test or either and which of them were or was in said city of Omaha on the day following the day said Shields entered said lands, and then and there or elsewhere, and if elsewhere they consulted or conversed with said Shields in regard to said entry and in regard to said lands, and what was then and thereby and between them said in that regard, and whether the aforesaid Francis Edward, Richard O'Brien, and Thomas Hawes did not at some time or times convey to them, the said Cassady and Test, or to one of them, or to some other and what person or persons, under the direction of them said Cassady and Test, or one of them, the lands so as aforesaid alleged to be owned by them respectively; and whether thereupon the said Cassady and Test, or one of them, either in their own name or the name of or on behalf of some other person or persons, did not make to said Shields or his aforesaid wife, or some other person, their bond or bonds whereby they or
40 he obligated themselves or himself to convey said premises to such person or persons therein named, upon the payment of some sum or sums of money therein mentioned, and that they may set forth such bonds, each and every thereof relating to the matters aforesaid, and may deposit the same with the register of this court for the usual purpose; and otherwise that they may account for such as are not in their possession or power, and that they may set forth a full, true, and perfect statement of the transactions and dealings, item by item, of them, said Cassady & Test, with said Shields, whether on their, the said Cassady & Test's, own account, or on account of some, and what other, person or persons, and that they deposit their books of account, containing the original entries of their dealings and transactions, in any and every manner, with said Shields, from the 18th day of June, one thousand eight hundred and fifty-seven, to the 18th day of June, one thousand eight hundred and fifty-eight, in the said register's office, for the usual purpose, and that it be, by the decree of your honor, declared that the entry of the lands first above

41 described, made by said Shields and the said register of the said land office, was fraudulent and void, and that said Shields, Cassady, Test, Evert V. Smith, Elerick Smith, John P. Baldwin, Grenville M. Dodge, and Nathan P. Dodge, hold the legal title to the lots and out-lots so aforesaid by the said Monell conveyed to your orator, in trust for him; and that they and said Mills, Megrath, Richards & Co., James Woods, William T. Christy, Robert K. Woods, William T. Gentry, and Joseph Woods, jr., Helfenstien, Gore & Co., be decreed to release the same, and all right, title, interest, claim, or demand, by them or any or either of them had, held, acquired, or claimed of, in, to, or upon the said lots and out-lots, each and every thereof, and that it be referred to a master to settle such conveyance, if the parties should differ about the same, and that the said parties may, in the mean time, be, by the order and injunction of this honorable court, restrained from bringing any action of ejectment against your orator, to turn him out of the possession of the said lots and out-lots; and that your orator may have all such other and further relief as the nature of this case shall require, and shall prove to your honor to be agreeable to equity and good conscience.

May it please your honor to grant unto your orator not only
42 the most gracious writ of injunction of the Territory, issuing out of and under the seal of this honorable court, to be directed to the said Robert Shields, Jefferson P. Cassady, James D. Test, John T. Baldwin, Grenville M. Dodge, Nathan P. Dodge, Evert V. Smith, Eldrick Smith, and to the agents, attorneys, solicitors, trustees, and counsellors, of them and each of them, to restrain them and each of them, touching any of the matters in question as aforesaid, but also the most gracious writ of subpœna of the Territory, to be issued in like manner, and directed to the defendants aforesaid, and to George M. Mills, Megrath, Richard & Co., James Woods, William T. Christy, William T. Gentry, Robert K. Woods, and Joseph Woods, jr., Helfenstien, Gore & Co., Gilbert C. Monell, and the city of Omaha, commanding them and each of them, that they, at a day certain therein to be inserted, be and appear before your honor, in this honorable court, then and there to answer the premises, and further to stand to, perform, and abide such order and decree herein as to [to] your honor shall prove to be agreeable to equity and good conscience; and your orator will ever pray, &c.

AARON ROOT.
JAMES M. WOLWORTH.
Solicitor and of Counsel for Complainant.

43 TERRITORY OF NEBRASKA, *County of Douglass, ss*:

Aaron Root, being duly sworn, says he is the complainant in the foregoing bill by him subscribed; that he has heard the same read, and knows the contents thereof, and the same is true, of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those matters he believes it to be true; that Robert Shields, Jefferson P. Cassady, James D. Test, John P. Baldwin, George M. Dodge, Nathan P. Dodge, Evert V.

Smith, Eldrick Smith, James Woods, William T. Christy, Robert K. Woods, William T. Gentry, and Joseph Woods, jr., and Helfenstien, Gore & Co., are non-residents of this Territory, and cannot be served with subpœna therein, and this suit is brought to exclude them from all interest claimed by them in certain real estate situate in said county and Territory.

AARON ROOT.

Subscribed in my presence, and sworn to before me, this first day of May, 1863.

[SEAL.] BYRON REED,
Notary Public for Douglas County, N. T.

[5-cent stamp.]

44 District Court, in Chancery, Douglas county, N. T., Omaha city. Before Daniel Gantt, master.

AARON ROOT
v.
ROBERT SHIELDS, JEFFERSON P. CASSADY, James D. Test, John T. Baldwin, Grenville M. Dodge, Nathan P. Dodge, Evert V. Smith, Eldrick Smith, James Woods, William T. Christy, Robert K. Woods, William T. Gentry, Joseph Woods, jr., and Helfenstien, Gore & Co., impleaded with George M. Mills *et al.*

Let notice of the pendancy of this suit be given to the above-named non-resident defendants, by publication in the daily Omaha, Nebraska, newspaper.

DAN. GANTT,
Master in Chancery.

AARON ROOT
v.
GEORGE M. MILLS, MEGRATH, RICHARDS & Co., Gilbert C. Monell, and the city of Omaha, impleaded with Robert Shields *et al.*

The register will issue subpœna to the above-named defendants, returnable according to law.

Dated May 1, 1863.

JAS. M. WOOLWORTH,
Sol. f'r C'mpl't.

Endorsed: Filed May 1, 1863. J. H. Kellom, register.

45 And afterwards, to wit, on the 23d day of June, A. D. 1863, there was filed in the office of the clerk of said court the de-

murrer to the bill of complaint of said complainants, in words and figures as follows, to wit:

District Court, Douglas county, June term, 1863.—In chancery.

AARON ROOT, complainant,
vs.
JOHN T. BALDWIN, JEFFERSON P. CASSADY, Nathan P. Dodge, *et al.*

The defendants, Balwin, Cassady, and Dodge, by protestation, not confessing all or any of the matters and things in said bill of complaint to be true, in manner and form as therein set forth and charged, doth demur thereto on the grounds following, to wit:

I. The defendant does not state such a case or facts sufficient to entitle him to the relief or discovery therein prayed.

II. The bill shows the city of Omaha, who was one of the original parties to the controversy with Robert Shields, the patentee, sold, through its trustee, Morrell, the property in dispute to complainant, during the pendancy of the litigation before the Secretary of the Interior.

46 III. The bill shows that this court has not jurisdiction of the subject matter of this action in this, that the whole controversy before the Land Department of the government, between Shields and his contestants, was that the settlement and occupancy of the land by Shields, and of his right to enter the same, which was passed upon by the Land Department in his favor, and a patent awarded him accordingly, and does not show or charge fraud on the part of the officers of said Land Department, or that they exceeded their authority in any way; but the bill does show that the tract was subject to pre-emption under the act of 1841, but asks this court to go behind the patent, and again determine the question of settlement and cultivation of the tract pre-empted by him, and the other incidental questions involved, which, after a litigation of five years, as shown by the bill, has been decided by the department in favor of Shields.

These defendants, therefore, submit to this honorable court whether they shall be compelled to make any other or further answer to said bill of complaint, but pray to be hence dismissed with costs.

REDICK & BRIGGS,
Sol. for Baldwin, Cassady & N. P. Dodge.

Endorsed: Filed June 23, 1863. J. H. Kellom, clerk.

47 And aftewards, to wit, on the 4th day of April, A. D. 1864, said demurrer was overruled, as appears on the journal of said court, in words and figures as follows, to wit:

At a District Court in Chancery, holden at the city of Omaha, within and for the county of Douglas, on the 3d day of April, 1864. Present: The Hon. William P. Kellogg, judge.

AARON ROOT
vs.
JAMES D. TEST, JEFFERSON P. CASSADY, John T. Baldwin and Greenville M. Dodge, impleaded with Robert Shields *et al.*

The demurrer filed in this cause by said defendants having been argued by counsel at a former term of the court, and duly considered, it is ordered that the same be overruled, and the defendants have time to answer the complainant's bill within sixty days from the rising of this court.

W. P. KELLOGG, *Judge.*

Endorsed: Filed April 4th, 1864. J. H. Kellom, register.

48 And afterwards, to wit, on the 11th day of June, A. D. 1864, there was filed in the office of the clerk of said court the joint and several answers of John T. Baldwin, Jefferson P. Cassady, Nathan P. Dodge, defendants, in words and figures following, to wit:

49 In District Court, Douglas county.—In chancery.

AARON ROOT, complainant,
vs.
JOHN T. BALDWIN *et. al.*, defendants.

The joint and several answer of John T. Baldwin, Jefferson P. Cassidy, Nathan P. Dodge, and James D. Test, defendants to the original bill of complaint, filed in this cause by said complainant, Aaron Root.

These defendants, and each of them, now, and at all times hereafter, saving and reserving to themselves, and each of them, all benefit and advantage of exception, and which can or may be taken to the many errors and imperfections in said original bill contained, for answer thereto, or unto so much and such parts thereof as these defendants are advised is material or necessary for them, or either of them, to make answer unto; these defendants, and each of them, answering, say that they admit it to be true that in the year 1854 a certain company or association of persons, and known as the Omaha City Company, claimed to own under the claim (or club)
50 regulations of the claim district in which the same were situated, among other lands, the west half of the southwest quarter of section ten, and the north half of the northeast quarter of section fifteen, all in township fifteen north of range thirteen east, in Nebraska; but these defendants deny that at the time aforesaid, or any other time, the said lands were occupied and surveyed

into lots, blocks, streets and alleys, in good faith, for town purposes, with the bona-fide intention on the part of said company of founding and building a town or city thereon, or for any legitimate or lawful purpose whatever; and these defendants alledge that said company never had any lawful existence, that they had no right or lawful authority to enter upon said lands for the purposes aforesaid, or for any other purpose whatever, and that what they did in the premises they did as trespassers upon the public lands of the United States, and for the sole purpose of speculating in said lands, and to thereby prevent bona-fide settlers from acquiring title to the same under the agricultural pre-emption laws of the United States, and that
51 the only rights which the said pretended company ever had in or to said lands, or any part thereof, were by virtue of the rules and regulations of an association of persons banded together for the sole purpose of controlling and disposing of these lands by fraud, force and intimidation, and for the purpose of setting at naught the laws and policy of the United States relative to the public lands, and the disposition thereof to bona-fide pre-emptors.

And these defendants, and each of them, further answering, represent to the court that the said Omaha City Company never laid out, platted or surveyed said lands, or any part thereof, in the manner prescribed by the laws of this Territory, or in any lawful manner whatever; nor was any plat or map of said pretended town site ever acknowledged, authenticated or recorded in the manner prescribed by law; but these defendants alledge that whatever said company did do in the premises was in violation of law, and that every person who had anything to do with the sale of and speculation in said pretended lots and town site was guilty of a misdemeanor under
52 said laws, and liable to indictment.

And these defendants, and each of them, further answering, say, that they have been informed that said pretended company did issue certificates to divers persons, but these defendants have no knowledge or information as to the character of the same, but are informed that these certificates pretended to convey to such persons some interest in said lands, or portions thereof, by virtue of the rules and regulations of said unlawful association of persons mentioned in the next to the last paragraph, and that said certificates conveyed no title or interest in said lands whatever to the holders thereof, for the reasons set forth in said paragraph.

And these defendants, and each of them, further answering, say, that they have no knowledge or information, save what appears from the allegations of said bill, whether on the first of September, 1855, or at any other time, the said Shields was the assignee and holder of certificate 416 mentioned in said bill, or any other certificate, nor have they, or either of them, any knowledge or information of any such certificate, or what it entitled said Shields to receive by
53 virtue of the same, nor whether said Shields was entitled to twenty lots in said tract, or any other number, by virtue thereof; or whether said company, from the first of said September, or at any other time, made the distribution of the lots mentioned in

said bill to the alleged assignees of said certificate or certificates, or anybody else; or whether said Shields was entitled to any lots under said distribution, if any was had; or whether said company ever made a deed or other conveyance to said Shields of the lots in said bill described. And these defendants, therefore, deny all of said allegations in said bill, and leave the complainant to establish the same by proof. But these defendants allege that if said company made the deed of said lots to said Shields, referred to in said bill, he, the said Shields, acquired no right, title, or interest in said lots, for the reason that said company had nothing to sell or convey.

And these defendants, and each of them, further answering, say, they have no knowledge or information, save from the allegations of said bill, as to whether said James C. Mitchell was entitled to lots under such alleged distribution, by virtue of a certificate or
54 otherwise, nor whether he was entitled to a deed of lots in said tract of the description set forth in said bill; nor whether said Shields and said Mitchell ever made an exchange of lots as in said bill set forth, or in any other manner; or whether said Mitchell ever made a deed to said Shields of the lots in said bill described, or whether any such deed was ever recorded; or whether said Shields by a like, or any other conveyance, sold or conveyed to said Mitchell the lots in said bill set forth; but these defendants leave said complainant to his proof of all of these allegations.

And these defendants, and each of them, further answering, admit that said Shields did enter upon and erect a dwelling house upon the lands first above described, and also admit that he built fences on and improved said lands; but these defendants say that they have no knowledge or information as to the precise portion of said tract upon which he built said fences, or whether they were on or off the lines of any pretended lots or streets; and further admit that said Shields occupied said tract, and lived in said house with his family
55 during about the period mentioned in said bill; but these defendants have no knowledge or information that any other person or persons improved or occupied said tract of land, or the said alledged lots, and therefore deny that allegation of the bill. And these defendants deny that said Shields occupied said lands or any part thereof, as a part of the city of Omaha, or as lands or lots selected as a town site; and further deny that said Shields only claimed rights to said tract by virtue of his deeds or title to the said pretended lots, and thereforefore deny all the allegations of the bill in that regard.

And these defendants allege that said Shields entered upon and improved said tract of land for the sole purpose of acquiring a pre-emption right, and to pre-empt said lands in good faith under and by virtue of the provisions of the United States agricultural pre-emption law of 1841, and that he continued to reside on and cultivate said tract till he was compelled temporarily to leave the same, as hereinafter set forth.

And these defendants, and each of them, further answering, say, that they have no knowledge or information, save from the

56 allegations of said bill, that said Shields did, on the 4th of June, 1856, or at any other time, sell or convey to said John Beeson the lots set forth in said bill, or any other lots, for the sum of eleven hundred dollars, or any other sum; or whether said Beeson paid said Shields the same, or any part thereof; nor whether said Shields conveyed said lots, or any other lots, to said Beeson; nor whether said alleged deed contained covenants of warranty against all persons except the United States, nor whether said deed was ever recorded; nor whether said Beeson took possession of said property as in said bill alleged; nor whether said Shields removed from the same at the time alleged. And these defendants, therefore, leave the complainant to his proof of such allegations. But these defendants admit that said Shields lived for a short time in a house in the city of Omaha, with his family, which these defendants will more fully explain hereafter.

And these defendants, and each of them, further answering, deny that said Shields was ever extensively engaged in the mercantile business, in the city of Omaha, as in said bill alledged, but

57 say that he did, about the time alleged in said bill, do a small business in said city for the purpose of supporting his family, while he was temporarily compelled to reside there, as will more fully appear hereafter, but these defendants have no knowledge or information as to the pecuniary condition and circumstances of said Shields at that time, or at the time of his alleged insolvency in said bill, and therefore leave the complainant to his proofs of that allegation; and these defendants further admit that said Shields did temporarily remove to said county of Sarpy about the time alleged in said bill, and that he remained there a short time, but these defendants have no knowledge or information save from the allegations of said bill, as to whether said Shields was ever the owner of any lands in Sarpy county, nor whether he lived upon, occupied, or improved, or erected a dwelling house on any lands of his own in said county, or whether he inhabited the same with his family or otherwise, nor whether at the time mentioned in said bill or at any other time he filed any declaratory statement in the United States land

58 office in Omaha, or any other land office, of his intentions to pre-empt lands in said county, or in any other county in this Territory or elsewhere, save the lands first above described, under the United States agricultural pre-emption law of 1841; these defendants and each of them therefore deny all the allegations of the bill in that regard, and ask that the complainant may prove the same.

And these defendants and each of them admit that on the 14th day of February 1857, the city of Omaha was incorporated by an act of the territorial legislature of Nebraska, and that the tract of land first above described was included within the corporate limits of said city, but these defendants allege that long prior to the incorporation of said city the said Shields had settled upon and improved said tract, and claimed the same under said pre-emption law, and the said lands never did in fact form any part of the town site of Omaha,

nor were the same ever in any manner whatever occupied or
59 improved as a town or city; and these defendants, and each of them, further allege upon information and belief that there never was erected on said lands any house or houses, building or buildings, or improvements of any kind whatever, except those made by said Shields as aforesaid, till long after the 21st of November, 1857, and long after said Shields had pre-empted said lands, and that even now no part of the same is occupied or improved as a town site or city or addition thereto; and these defendants further allege that the city of Omaha never claimed said tract under the municipal pre-emption laws of the United States of 1844, or under any law or laws, but that said city claimed and secured by pre-emption, under said act of 1844, three hundred and twenty acres of other lands, situated more than a mile south of the tract in question; and these defendants further allege that by virtue of said act of incorporation thousands of acres were included within the corporate limits of the said city of Omaha, and that at least three-fourths of such lands, including
60 the tract in question, were in no sense occupied or improved as city or town property, but were entirely vacant lands, save only so far as portions of the same were occupied by settlers, who were in good faith seeking to avail themselves of the agricultural pre-emption laws of the United States, and these defendants insist that the territorial legislature had no right or authority to exclude from the operation of said agricultural pre-emption laws, by including within the corporate limits of said city these large tracts of lands, and thereby deprive the settlers of their rights under said laws of 1841.

And these defendants, and each of them, further answering, say, they have no knowledge or information, save from the allegations of said bill, that the said Shields was on the 22nd of September 1857, or at any other time, seized in fee simple or otherwise of the lands in the said county of Sarpy, of the description and quantity in said bill alleged, or any other description or quantity in said county, or in any other place, nor whether he ever resided on such lands or any part thereof; and these defendants therefore deny all the allegations of said bill in that regard, and leave the complainant to his
61 proofs.

And these defendants, James D. Test and Jefferson P. Cassady, and each of them, deny, and the said Nathan P. Dodge and Jonathan T. Baldwin, on information and belief, deny that on the 1st day of September, 1857, or at any other time, the said Test and Cassidy, or either of them, entered into an agreement with said Shields of any kind by which said Test and Cassidy, or either of them, should purchase or should advance to Shields funds of any kind whatever with which to purchase of said Beeson the alleged lots 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, in said block 128½; and each and all of said defendants further deny that there was any agreement or arrangement of any kind whatever by which he said Shields should remove from said Sarpy county, or from anywhere else into the house aforesaid, situated on said tract or pretended lots.

And these defendants and each and all of them further deny that said Shields and said Test and Cassidy, or either of them, had any agreement or arrangement or arrangements whatever relative
62 to the pre-emption by said Shields of the tract of land first above described, or any part thereof, and further deny that said Shields ever made any agreement, contract or arrangement, of any kind or nature whatever, by which the title to said lands, or any part thereof, which said Shields was about to enter by pre-emption, should enure to the benefit of said Cassidy and Test, or either of them, or to any other person or persons for them, or for anybody else; and further deny that said Test and Cassidy, or either of them, or any person for them or either of them, ever advanced any money to said Shields with which to repurchase of said Beeson the said pretended lots, any part of said tract; and further deny that said Shields ever made any agreement, contract or arrangement whatever by which he should sell or convey the same or any part thereof to any person or persons whomsoever, or to the alleged owners of any pretended lots or parts of lots in said tract or otherwise; and these defendants and each of them deny all the allegations of the bill in that regard.

And said defendants, Test and Cassidy, further answering, deny, and the said Nathan P. Dodge and John T. Baldwin, defend-
63 ants, say they have no knowledge or information of any of the matters hereinafter referred to in this paragraph, and therefore deny that said Test and Cassidy, or either of them, and said Shields, made or entered into any agreement, contract or arrangement whatever at the time charged in said bill, or at any other time, whereby said Test, Cassidy, or Shields, or either of them, with funds for that purpose furnished or advanced to said Shields by said Test and Cassidy, or either of them, was or were to repurchase the said lots or any of them of said Beeson for the sum of two thousand dollars or any other sum; and these defendants deny specifically all the allegations of said bill in that regard, and further deny the allegations in said bill that said Shields did not erect a new dwelling on said tract, but these defendants admit that about or prior to the time mentioned in said bill the said Shields again repossessed himself of the said tract of land and the improvements made thereon by him as aforesaid, and they further admit that said Shields claimed to be en-
titled to, and endeavored under and by virtue of the act of Con-
64 gress aforesaid, with the proper officer of the United States land office at Omaha, to acquire title to said tract of land by pre-emption.

And these defendants and each of them further answering say that they have no knowledge or information whether, on or about the first of November, in the year 1857, or at any other time, the said register refused to permit said Shields to enter said lands, for the reason among others that the same were a part of the public lands which had been, as above stated, selected as the site of the city of Omaha, save from the allegations of said bill, and these defendants therefore leave said complainant to his proofs of these allegations.

And these defendants and each of them further answering say that they have no knowldge or information that said Shields did promise and agree with said register that, if he (Shields) were permitted to pre-empt said lands, he would thereafter when requested convey the lots severally claimed by each to the persons who claimed to be owners thereof, but these defendants are informed and believe that all the aforesaid allegations of said bill are wholly untrue in every
65 particular, and these defendants therefore specifically deny the same and leave the complainant to his proofs; and these defendants and each of them do further deny that said Shields promised or agreed to and with the owners or claimants of said lots that if permitted without objection interposed by them to the pre-emption of said lands, that he (Shields) would when requested convey to such persons the lots claimed by them; and these defendants and each of them specifically deny all these allegations of the bill and leave the complainant to his proofs.

And these defendants and each of them, further answering, deny that said Shields made any promises or agreements to or with said register or the pretended owners or claimants of said pretended lots, of any kind or nature whatever, and further deny that said Shields, in that manner or any other manner, induced that officer to entertain his application to pre-empt said lands; and further deny that said Shields, by any agreement or arrangement whatever with the said pretended lot owners, induced them or any of them by the
66 means alleged in said bill, or any other, to withhold their objection and opposition to his entry of said lands by pre-emption.

And these defendants and each of them specifically deny all the allegations of the bill.

And these defendants and each of them admi t that said Shields made proof, but whether ex parte or not these defendants have no knowledge or information, and leave the complainant to his proofs of that allegation, which was satisfactory to the said register and receiver, that on or about the first day of April, A. D. 1856, he settled in person upon said tract; that he had erected a dwelling house thereon, and inhabited the same, and largely improved the same, as is by the above entitled act of Congress required.

And these defendants and each of them further admit, that said Shields made oath to such matters as are by such act required to be sworn to by persons claiming the benefit of said act before they are allowed to enter lands under the same.

And these defendants further admit that said Shields did then and there make oath before said register and receiver that he, (Shields) had never had the benefit of any right of pre-emption
67 under said act; that he was not the owner of three hundred and twenty acres of land in any State or Territory; that he had not settled upon and improved said tract to sell the same on speculation, but in good faith to appropriate the same to his own use and benefit; and that he had not directly or indirectly made any agreement or contract in any way or manner with any person or per-

sons whomsoever by which the title which he should acquire from the government of the United States should enure to the benefit of any person except himself.

And these defendants and each of them admit that said Shields paid to said land officers the minimum price established by law for said lands; and these defendants admit that thereupon the proper officer of said land office made and issued to said Shields the usual duplicate receipt for the money so paid for said lands, and that then said register made and issued to said Shields, and for his use, the usual patent certificate for said lands.

Ane these defendants and each of them, further answering, admit that said Shields and wife did, on or about the 23rd of
68 November, 1857, convey by deed in the usual form, with the usual covenants, to said James D. Test the undivided one-half of the premises first above described; and these defendants say they will produce said deed, or a certified copy thereof, if the original cannot be found, to the court, on or before the hearing of this cause.

But these defendants and each of them deny that said deed was made in pursuance of any agreement or arrangement between said Cassidy and Test, or either of them, before the pre-emption of said lands by said Shields, and therefore deny specifically all such allegations of the bill, and leave the complainant to his proofs.

And these defendants, further answering, admit that said Test did, about the time stated in said bill, convey the undivided one-fourth of the lands first above described to John T. Baldwin and Grenville M. Dodge, defendants, and also made conveyance of the lots in said bill alledged, and also admit that said Shields and wife about that time sold said pretended lots to said Baldwin.

But these defendants and each of them deny that said Cas-
69 sidy and Test, or either of them, with the said transaction relative to the sale and conveyance of the property last aforesaid had anything to do whatever.

And these defendants further say that they will show the court, if the same can be found, the said deeds; if not, a copy thereof.

And these defendants allege that said deeds in which said lands were described by lots were made in that way merely for the convenience of description, and with no intention of recognizing the same as town property.

And these defendants, further answering, say that they are informed and believe that said Shields did, in the month of January, 1858, convey to Evert V. Smith the lands alleged to have been conveyed to him in said bill, but these defendants have no knowledge or information as to the whereabouts of said deed of conveyance or the contents thereof.

And these defendants and each of them, further answering, say they have no knowledge or information save from allegations of said bill as to the time when said Shields removed from said lands, or as to what particular place he removed to, or as to whether he
70 removed to any lands of his own in said Sarpy county, or

anywhere else, or whether he continued to reside on any such lands for the time alledged in said bill, or any other time, or when he removed from this Territory, all of which said allegations these defendants leave said complainant to his proofs.

And these defendants and each of them, further answering, say that they believe it to be true that the city of Omaha, or persons claiming to represent her, filed some paper purporting to be a caveat in said land office, for the purpose of contesting the right of said Shields to said lands, but these defendants have no knowledge or information as to the nature and contents of said alleged caveat, or what particular facts were therein alleged, if any, save only from the allegations of said bill, and these defendants ask that said complainant may establish such allegations by proof; and these defendants further say they are informed that the commissioner of the General Land Office did, about the time alleged in said bill, direct a reinvestigation of such pre-emption, but for what reasons these defendants have no knowledge or information; and these defendants further say they
71 have no knowledge or information whether due and reasonable notice was given to said Shields of such reinvestigation, or any other notice, or whether the official letter was written as charged in said bill, or whether said register and receiver were directed to take and report testimony and other proceedings in the case, as therein charged; and these defendants, therefore, leave the complainant to his proofs of all these allegations.

And these defendants and each of them, further answering, say, they admit that several persons, and among the number some of these defendants, were represented before said land office in said contest relative to said pre-emption, and further that they are informed and believe that certain persons pretended to represent the city of Omaha in the same matter, and that witnesses were examined as to the subject matter in dispute, and that their testimony was somewhat lengthy, and that the same related to the right of said Shields to pre-empt said lands, but these defendants and each of them deny that said testimony indisputably, or in any other manner,
72 established the fact that said Shields did not enter upon, settle and improve said lands as a pre-emption, or that he did not in all and every particular comply with the terms of said act of Congress, and further deny that said testimony established the fact that said Snields had before his pre-emption made an agreement or arrangement of any kind whatever, with other persons, by which the title he should acquire to said lands should enure to the benefit of any other person or persons than himself; and these defendants and each of them deny specifically all the allegations of said bill relative to the weight and character of said testimony.

And these defendants, Cassidy and Test, and each of them, further answering, represent, that having purchased of said Shields portions of said lands in good faith, and without any knowledge whatever of any defect in his title to the same, and having paid therefor respectively large and valuable considerations, these defendants had a deep interest in maintaining said pre-emption, believing it to be in all respects good and

bona fide, and to that end these defendants, Cassady and Test,
73 sought to procure testimony to rebut that offered by those seeking to set aside said pre-emption, and did succeed in procuring some testimony, but were unable to procure the testimony of important witnesses for said Shields, for the reason that said land officers refused to compel their attendance, alleging they had no legal right to coerce the attendance of witnesses; and that said witnesses being under the influence of said unlawful association of persons referred to in the beginning of this answer, and some of them being interested in the speculations of said pretended Omaha City Company, and some of them being associated with said conspirators, who were seeking by all means, lawful or unlawful, to absorb a large tract of country within the limits of said city, for the purpose of speculation as aforesaid, and thereby defeat the rights of bona-fide pre-emptors, utterly refuse to appear before said land office and testify in said contest; but these defendants allege that notwithstanding the testimony in said bill alleged to have been taken on the part of said contestants, the validity of said pre-emption was in
74 no sense disturbed or affected. And these defendants further deny that the charter of said city of Omaha, or any other law, conferred any right on the corporate authorities of said city to appear in said land office and contest the rights of parties to agricultural lands—that being a matter which no way concerned them.

And these defendants and each of them, further answering, say they have no knowledge or information whether said receiver carefully and maturely considered said testimony and the matters connected with said contest, or whether he did, by his official letter of the date referred to in said bill, or any other date, report to said Commissioner that said Shields was not entitled to pre-empt said lands; or whether said receiver represented in any such letter that the lands in question had been selected as a site for a city, and were included within the corporate limits of Omaha; or whether he represented that said Shields did not, in April, 1856, settle upon, or improve, or inhabit, or build a house upon said premises, with a view of
75 pre-empting the same under said act; or whether he, the receiver, represented that the entry made by said Shields was not for his benefit, but for the benefit of other persons; or whether the said receiver recommended the said entry to be cancelled; or whether said receiver forwarded any such letter to the Commissioner, with the testimony aforesaid, save from the allegations of said bill; and these defendants and each of them leave said complainant to his proofs of all such allegations.

And these defendants, and each of them, further answering, say they admit that said Cassady, Test, Smith, and Baldwin, have always maintained that said pre-emption was valid, and was made in good faith, but deny that said Shields did not, at any time and in no manner, participate in the proceedings relative to said pre-emption, but say that said Shields assisted, to some extent, in maintaining the validity of said pre-emption. And these defendants further say they have no knowledge or information as to the manner in which said

Commissioner considered said report of said receiver, or
76 whether he considered the record of said testimony and proceedings, and the arguments of counsel, as in said bill set forth; but these defendants are informed that said Commissioner did affirm the report of said receiver; and these defendants believe it to be true that the entry of said Shields was set aside by said Commissioner, but they are not advised as to the letter, or the contents thereof, addressed by said Commissioner to said receiver, as alleged in said bill.

And these defendants and each of them admit that said case was appealed from the decision of said Commissioner to the Secretary of the Interior, and that said Secretary affirmed the action of said Commissioner in the premises; but in making that ruling there was no such mature consideration of the testimony and facts in the case as is ascribed to said Secretary in said bill, but, on the contrary, these defendants represent that by fraud, corruption, and bribery, the said Thompson was induced to make the ruling which he did, and that in addition, the mind of the said Secretary was so totally and wholly absorbed in devising ways and means to overthrow the govern-
77 ment of the United States that he did not give the case in question the mature consideration aforesaid to which the same was entitled; and further, these defendants are informed, and have reason to believe, that the parties interested in defeating said preemption paid sums of money to said Thompson in order to induce him to make the ruling which he did.

And these defendants and each of them, further answering, say that they are informed and believe it to be true, that about the time alleged in said bill said Commissioner directed the said register and receiver, after due notice in that behalf given, to sell at public auction the said lands; but these defendants say they have no knowledge or information, save such as appears from the allegations of said bill, whether due and legal notice was given of such sale as provided by statute; but these defendants admit that about the time mentioned in said bill said premises were sold at public auction, and that Gilbert C. Monell bid in the west half of the southwest quarter of said section ten for the sum of one dollar and a quarter per
79 acre, and that the usual receipt and certificate was issued by said land officers to said Monell.

And these defendants and each of them, further answering, say that they are informed and believe, and charge the truth to be, that a short time before said special sale of lands took place, a large number of the leading and influential citizens of Omaha and vicinity entered into an agreement and unlawful combination, whereby it was planned and agreed upon that said Monell should be protected in bidding off the one-half of said lands, at the price of one dollar and twenty-five cents per acre, and that said Smith should bid off the other half at the same price; and that said citizens held several secret meetings wherein a conspiracy was formed and matured, arrangements made, and a programme effected, by which the aforesaid object should be successfully carried out; and that said conspiracy was formed for the

sole and express purpose of procuring said lands at the price aforesaid, when, in fact, as these defendants expressly charge the truth to be, all of said lands, at that time, were worth, on an average, at least the sum of fifty dollars per acre, and for the unlawful and fraudulent purpose of defrauding the government of the United States out of a large sum of money.

And these defendants further allege, that on the day and at the hour when said sale was appointed to take place as alleged in said bill, the said conspiracy having become thoroughly matured and ripe for the execution of its dark and unlawful purposes as aforesaid, the said citizens, who had formed and were concerned in said conspiracy and unlawful combination, assembled, in large numbers, at the front door of the United States land office in said Omaha, at the hour and time fixed for said sale to take place, and then and there—many of whom were armed with deadly weapons—and, in a loud and tumultuous manner, threatened personal violence on any one who should bid on said tract of land, or any part thereof, against said Monell and Smith, or either of them; and that, in consequence of such threats and intimidations, a large number of persons who were desirous of bidding on said lands a far higher sum than the said minimum price per acre, were prevented from so doing through fear of personal violence, and that in consequence the said Monell and Smith, who were in the confidence of said conspiracy, and acting a prominent part therein, severally bid off the said lands, according to said arrangement, for said sum of one dollar and twenty-five cents per acre, whereby the government was defrauded out of a large sum of money, and in direct violation of the laws of the United States enacted to prevent fraudulent practices at the public land sales; all of which matters and things said complainant was duly advised at the time said special sale took place, as these defendants are informed and verily believe.

And these defendants and each of them expressly charge the truth to be that when said complainant purchased the lots and land claimed by him in said bill, he had full knowledge of the fraudulent manner of conducting said special sale, and of the matters hereinbefore alleged relative to the same; but these defendants are not informed whether said complainant was an active participant in said conspiracy or not, but believe that he was.

And these defendants and each of them represent further, that soon after said special sale took place, and long before said complainant purchased of said city and Monell the lands claimed by him in said bill, a caveat was duly filed in the United States Land Office, setting forth in substance the facts hereinbefore alleged relative to the fraudulent character of said sale, and that immediate measures were taken to set said sale aside; and to that end a large mass of testimony was taken before the said Land Office, all tending to conclusively establish the fraudulent character of said sale.

And these defendants further represent that the fraudulent character of the said sale obtained a very general and wide-spread notoriety in the city of Omaha, where said complainant resided at that

time, and almost every business man in said city was cognizant of the matters aforesaid, all of which said complainant was well advised before his said purchase of said city and Monell of the prem-
83 ises claimed by him in this suit, and that he had actual notice of the fraudulent character of said sale, and of the facts and circumstances connected therewith; and that he had also full knowledge that said caveat had been filed as aforesaid, and of the taking of said testimony, and that strong efforts were being made to set said sale aside, all of which he was advised before said purchase; and yet, notwithstanding, said complainant in a short time thereafter proceeded to purchase the said lands claimed by him in said bill, with full knowledge of the matters aforesaid, and of the rights and equities of these defendants to the premises.

And these defendants further represent that the Land Department of the United States, through its proper officer, after a full and thorough examination of all the facts and testimony in the case, set aside said special sale, on the ground that the same was fraudulent and void, and in violation of the laws of the United States, and that said complainant, said Monell and said city, were duly notified of the proceedings that were being had to set aside said sale, and
84 that they appeared either in person or by counsel at the land office in Omaha, and in the Land Department at Washington, and resisted the proceedings which were being had to set the same aside by introducing opposing testimony and otherwise.

And these defendants and each of them, further answering, say they have no knowledge or information, save only what appears from said bill, whether said Monell purchased said lands as the agent and trustee of the city of Omaha, and persons claiming to own lots in said tract; nor have these defendants any knowledge or information relative to the nature and character of said alleged trust, or whether said Monell was to deed certain lots to persons claiming the same, and then sell the remainder of said land on account of the city of Omaha.

And these defendants, and each of them, therefore leave said complainant to his proofs of all such allegations; nor have these defendants any knowledge or information whether said Monell procured a resurvey of said lands at the time and in the manner charged in said bill, or whether he made a plat thereof, or caused the same
85 to be made, or whether said plat was recorded at the time and in the manner in the said bill alleged, or in any other manner; and these defendants, therefore, leave said complainant to his proofs of these allegations.

And these defendants and each of them, further answering, say that if it be true that said land was bid in by said Monell in trust and for the benefit of said city, as in said bill alleged, yet these defendants and each of them allege that said city nor its corporate authorities had any right or authority, by virtue of its charter, or by virtue of any other law, to buy or acquire title to such lands by a trustee or otherwise, as said lands were not in any manner improved or occupied as city or town property, and the said city had no right

or authority to interfere with the same in any manner whatever, and that no title in said lands could vest in said city or its said trustee, Monell, and that, therefore, none could pass from said city or Monell to said complainant, or anybody else.

86 And these defendants and each of them, further answering, say they have no knowledge or information, save only from what appears from the allegations of said bill, whether said complainant held mediately or in any other manner from said pretended Omaha City Company, by deeds or otherwise, from it to lots in the said Monell purchase; nor whether said Monell and wife conveyed said lots to said complainant, as is alleged in said bill or in any other manner, or what the terms were of such conveyance or covenants therein contained; nor whether, on the 31st of January, 1861, or at any other time, said Monell conveyed to said complainant the lots in said bill alleged; and these defendants, therefore, leave the complainant to his proofs of all such allegations; but these defendants distinctly deny that said Root had any right or title whatever in or to said alleged lots, either in law or equity.

And these defendants, and each of them, further answering, say that they are informed, and believe it to be true, that said city of

87 Omaha, for an alleged consideration of about the sum of nineteen hundred and eighty dollars, which consideration will be hereinafter explained, did convey to said complainant the lands or lots in the said bill alleged, and that, at about the time alleged in said bill, by direction and appointment of the city of Omaha, convey the said property to said complainant as aforesaid; but these defendants have no knowledge or information as to the terms or contents of said deed, and therefore leave the complainant to his proofs of the same.

And these defendants allege that, for the reasons before set forth in this answer, the said city had no title or interest in said property which it could convey to said complainant through the deed of Monell or otherwise.

And these defendants, further answering, admit that, about the time mentioned in said bill, complainant took possession of said property, but deny that he had any title to the same whatever; and further admit that he made improvements thereon, but of what value these defendants are not informed save by said bill.

88 And these defendants and each of them, further answering, represent that said complainant did not pay for the lands purchased of said Monell and said city the sum alleged in said bill, or any other sum whatever, except, perhaps, the nominal sum of five or six dollars for making said deeds; but these defendants expressly charge the fact to be that said sum of nineteen hundred and eighty dollars, which said bill alleges was paid for said land and lots, was in no sense money or property of any value, but that the same was bills in the form of bank notes, which were, in 1857, issued by the city of Omaha, and commonly called Omaha city scrip; that said scrip was in the similitude of bank bills, signed by the mayor and recorder of said city, and by said mayor and said corporate

authorities issued wholly without authority or color of law, and in direct violation thereof, which bills were issued in the following form, to wit:

"NEBRASKA TERRITORY.

"The city of Omaha will pay dollars to bearer one year after date, with interest at the rate of 10 per cent. per annum.

"JESSE LOWE, *Mayor.*

"H. C. ANDERSON, *Recorder.*

"Omaha City, Sept. , 1857."

89 And that all of said bills were in the same form, except as to amount and date.

And these defendants represent further, that the territorial legislature of this Territory never conferred on the corporate authorities or on the mayor and recorder of said city any authority or right whatever to issue or put in circulation said scrip, or any part thereof, but that the issue of the same was wholly and totally void, and had no legal or moral value whatever; wherefore these defendants insist that said complainant never paid any consideration for said lands claimed by him in said bill, except the nominal consideration before stated, but that he is simply a voluntary grantee of said city and Monell, and in no situation to ask the aid of this court as an innocent and bona-fide purchaser of said lands for a valuable consideration; and further, that whatever improvements said complainant may have made on said lands, he made with full knowledge of the matters aforesaid, and also with full knowledge that these defendants were, respectively, the lawful and bona-fide owners of the lands first

90 described in this answer, and of the claims and rights of these defendants and each of them, respectively, in the same; yet, notwithstanding all this, the said complainant sought to unjustly deprive these defendants of their legal and equitable rights in and to said premises, and now comes and asks this honorable court to aid and assist him in carrying out his said fraudulent designs.

And these defendants and each of them, further answering, say that pending the negociation between the complainant and said city relative to the purchase of said property, or at any other time, these defendants, or any of them, had any knowledge, information, or belief of any kind whatever relating to said negotiation or sale, and they further deny that they, or either of them, had even any intimation that said complainant intended to purchase said property, or any part thereof; and further deny that they, or either of them, at any time, had any knowledge, information, or intimation that said complainant was improving said property by the erection of buildings or fences, or in any other manner, and further deny that they

91 or either of them ever concealed, or by word or deed induced said complainant to believe that these defendants, or either of them, did not claim title to said premises, as hereinafter set forth. But on the other hand these defendants are informed and believe, and therefore charge the truth to be, that said complainant was be-

fore, at the time of and ever since the time of his purchase of said city and said Monell of the property in question, well advised, and had full knowledge of the rights, claim, and title of these defendants and each of them to the premises in question; and these defendants further charge that said complainant purchased said premises with full knowledge of the rights of these defendants in and to the same.

And these defendants and each of them, further answering, say they admit that on or about the 13th day of December, 1861, Caleb B. Smith, Secretary of the Interior, reviewed and reconsidered, and reversed the said decision made by said Secretary Thompson relative to said pre-emption, and that said Secretary Smith ordered and

92 caused the purchase of said premises made by said Monell as aforesaid to be cancelled, annulled, and altogether held for naught; and further admit that the pre-emption entry made by said Shields on the 21st day of November, 1857, was, by the action aforesaid, reinstated and restored to and into the same plight the same was in and on said day; but these defendants and each of them deny that said ruling of said Smith was in violation of the well settled course and practice of the land department of the United States, and deny that the same was in any manner in violation of the law of the land, and further deny that said testimony was not fairly examined and considered by said Smith, and deny that said decision was summarily had, but these defendants say that said decision was made after the most mature deliberation, and thorough examination of the testimony and facts in the case on the part of said Smith, and in strict accordance with the practice of said Land Department and the laws of the land. But these defendants further answering say they have no knowledge or information whether said complainant, said

93 Monell and said city of Omaha, or either of them, had no notice of said proceeding.

And these defendants, further answering, admit that the city of Omaha and said complainant exhibited before the said Secretary a caveat against the issuance of the usual letters patent to said Shields for said land; but these defendants had no knowledge or information as to the matters and things set up in said caveat, save only from the allegations of said bill; and these defendants therefore ask that said complainant may establish said allegations by proof, and these defendants further admit that said Secretary, after examining the case made by the same, dismissed said caveat and proceedings, and ordered that the usual letters patent should issue to said Shields for said lands, and these defendants deny that in his action in the premises he disregarded his duty or violated the rights of anybody in sustaining the entry of said Shields, and further deny that said Secretary refused to entertain the proceedings aforesaid.

94 And these defendants, further answering, admit that said Cassady and Nathan P. Dodge, defendants, claimed interests respectively in said premises, the nature and extent whereof will be hereafter fully set forth.

And these defendants are informed and believe that said Smith claims an interest in said premises, but are not advised as to the nature or extent thereof.

And these defendants, further answering, say that they have no knowledge or information relative to the allegations in said bill, whether Megrath, Richards & Company were creditors of said Shields at the time alleged in said bill, or whether said Shields being indebted to said partnership, deposited or assigned to it, by way of equitable mortgage or otherwise, the duplicate receipt made and issued to him by said receiver, or whether if said Shields was indebted to said firm, the same has been paid or not, or whether said firm have said receipt in their possession, or under their control, for the purpose aforesaid, or any other purpose, only from the al-
95 legations of said bill, and these defendants therefore leave said complainant to his proofs of these allegations. And these defendants deny that said lands stand charged with any lien or incumbrance in consequence of any matters alleged in said bill relative to the assignment of said receipt.

And these defendants, further answering, say they have no knowledge or information as to whether said Evert S. Smith gave his promissory note to said Shields in part payment for the portion of said premises purchased by him, or any other of the allegations of the bill in that regard, and therefore leave the complainant to his proofs of such allegations.

And these defendants, further answering, say they are not advised whether Wood, Christy and Company obtained a judgment against said Shields at the time alleged in said bill; or whether Helfenstien Gore and Company recovered a judgment against said Shields at the time alleged in said bill; nor are they advised as to the amounts respectively of such judgments, if any such exist, save only from the allegations of said bill, and these defendants therefore leave
96 said complainant to his proofs of such allegations.

And these defendants and each of them, further answering, say they admit that the Commissioner of the General Land Office desired the delivery up of said receipt or patent certificate, or its loss accounted for, before he caused the letters patent to issue for said lands, but these defendants and each of them deny that said Cassady, Test and Baldwin applied to said Megrath, Richards and Company to surrender up to them said receipt, and further say that they had no knowledge that the same was at that time in the possession of said firm, but supposed the same to be lost, or beyond the control of these defendants; and further these defendants admit that an affidavit was made in writing to that effect, but deny that any false or fraudulent representation was made by said Test, or anybody else; that the facts therein stated were true to the best knowledge and information of the person making the same, and these defendants be-
lieve that the statements therein were true; and these de-
97 fendants further admit that said affidavit was filed in the land office, as charged in said bill, and that thereupon the proper officer of the Government did issue the usual letters patent of the United States for said lands, whereby they granted and conveyed to said Shields, in fee simple, forever, the tract of land in this bill first described, which letters patent these defendants will show the court

at or before the hearing of this cause. But the said defendant, Baldwin, in explanation of his answer in regard to said certificate, says, that after the said oath was made and filed, and patent issued, he learned that said company had said certificate in their possession, and he therefore called on them to obtain possession of the same, but did not obtain it, nor had this defendant any personal knowledge that said certificate was in the hands of said company at that time.

And these defendants, further answering, deny that said Cassidy, Test, Baldwin and Dodge, or either of them, have threatened to bring an action of ejectment to turn said complainant out of the pos-
98 session of said lands, but they have no knowledge or information as to what said alleged firms, or either of them, have threatened or proposed to do in the premises, or whether any one desires to bring vexatious and expensive suits against said complainant, as charged in said bill, and therefore leave the complainant to his proofs.

And these defendants and each of them further answering, represent to the court that at or about the time charged in said bill the said Shields did enter upon the lands first described in this answer, and did then commence improving said premises by the erection of a large and commodious dwelling house on said lands, which house was a frame building containing three or four rooms, and that said house was fitted up by said Shields in a good tenantable condition, suitable for a farm house; and that at or about the time alleged in said bill he moved into said house with his family, and contined to reside therein for some time, and while living there he fenced a portion of said lands with a good substantial fence, erected
99 one or two small out-buildings, cultivated a portion of said premises as a farm, raising such crops thereon as are usual in this latitude, and otherwise improving the same; and that after making such settlement on said lands, but at what precise time these defendants are not informed, but ask leave to refer to the records of the Land Office for the purpose of fixing the time, the said Shields filed his declaratory statement in writing in the said Land Office at Omaha of his intention to claim and pre-empt said lands under and by virtue of an act of Congress of the United States entitled "An act to distribute the proceeds of the sales of the public lands, and to grant pre-emption rights to actual settlers," approved September 4th, 1841.

And these defendants and each of them further answering say, that they are informed and believe that said Shields did, about the time set forth in said bill, remove from said lands, but these defendants and each of them represent to the court that they are informed, and believe, and charge the fact to be, that at, before, and after the time when said Shields left said
100 land, there existed in full force and efficiency an association of persons known as the Omaha Claim Club, and that the object and purpose of said association were to protect persons in holding claims of three hundred and twenty acres, and in direct violation of the laws of the United States; that said association made certain rules and bye-laws and gave them notoriety by publication and other-

wise, and that by them the said association were regulated and governed in the aforesaid claim matters, and that these rules and laws were designed to and did protect persons in holding the unlawful and exclusive possession of the quantity of land aforesaid; and that said association was for several years a terror to all those who desired to enter upon lands in the vicinity of Omaha, and avail themselves of the rights conferred by said act of Congress, and that the fame and notoriety of said association, and its terrible deeds of personal violence on those who dared to violate its rules and regulations, were such as to deter men from settling on these vacant lands around
101 Omaha to any considerable extent; and these defendants are informed and believe that several instances occurred in the vicinity of the lands in dispute, where the rightful claimants and occupants under said pre-emption law were forcibly or by threats and intimidation compelled to abandon their claims through fear of personal violence, and of their lives, and that they were compelled to leave the same to escape the vengeance of said association, and that one of these cases occurred on lands adjoining the premises in dispute. And these defendants further represent that the city of Omaha, or those who claimed to repre the city as officers thereof, were prominently connected with said association, for the purposes hereinbefore set forth.

And these defendants and each of them, further answering, say that they are informed and believe that said Shields left said lands after he had in good faith entered upon the same for the sole purpose of pre-empting them under the said act of Congress, in conse-
102 quence of the threats and intimidations of said association, and through fear of personal violence from it; that said association or members thereof often threatened to take the most extreme measures against said Shields if he continued to remain on said lands, and sought to pre-empt the same under said act of 1841, and that through fear of personal violence said Shields left his home on said lands, and removed first to the city of Omaha, about a mile distant, and remained there for some time, not deeming it safe to return to his said home on said lands, and that finding it difficult to obtain a livelihood for himself and family in said city, where rents were high, and cost of living very great, he removed out into the country, and, these defendants believe, into Sarpy county, where he could live cheaper till such time as he could safely return to the home which he had been compelled to abandon on said lands. And these defendants further represent that in the latter part of the summer of 1857 the said association ceased in a great measure to be efficient and formidable,
103 and having at time nearly lost its vigor and terrors, and the said Shields, learning that fact, went back on to said lands, and again moved into said house with his family, and entered upon the enjoyment of his legal rights under said act of Congress, and then and there in good faith besought again to carry out his original intention to enter said lands under the said pre-emption laws; and these defendants are informed that said Shields left said lands for the reasons hereinbefore set forth, and through fear of said association if he

remained on the same; and these defendants charge that in no sense did he leave said land for any fraudulent purpose, or with the intention of abandoning the same.

And these defendants and each of them, further answering, represent to your honor that the said Shields, continuing to reside upon and improve said lands, did on the 21st of November, 1857, appear in person and with witnesses before the register and receiver of
104 the United States land office at Omaha, and did there prove by his own oath, and the oaths of said witnesses, that he (Shields) was a citizen of the United States, and above the age of twenty-one years, and that he was the head of a family; that he was not at that time the owner of three hundred and twenty acres of land in any State or Territory of the United States; and that he never had the benefit of any right of pre-emption under said act of Congress; that he had not settled upon and improved said tract of land to sell the same on speculation, but in good faith to appropriate the same to his own use and benefit, and that he had not directly or indirectly made any contract or agreement in any way or manner, or with any person or persons whomsoever, by which the title which he should acquire from the government of the United States should enure to the benefit of any person or persons except himself. And it was further made to appear to the satisfaction of said register and receiver by the testimony of said witnesses, that said Shields had made a settle-
105 ment on said lands, that he had erected a dwelling house thereon of the description before set forth; that he was residing therein with his family, and that he was cultivating and improving said premises as a farm; all of which facts, representations and testimony these defendants, and each of them, are informed and believe are true, and so charge the fact to be; and that thereupon said Shields entered said lands, paid for the same the minimum price, and the proper land officer issued to him the usual patent certificate therefor. And these defendants further represent that said lands had not in good faith been selected as the site for a city or town, nor was said land or any part or parcel thereof actually settled and occupied for town purposes, or for any purposes of trade or manufacturing whatever; nor were said lands or any part thereof saline, mineral, military, school, or any other class of lands which by law are exempted from the operation of said act of Congress, but that the same were subject to pre-emption under said act.

And the said James D. Test, further answering, alleges, and the said defendants, Jefferson P. Cassidy, Nathan P. Dodge, and
106 John T. Baldwin, represent that they are informed and believe that he, said Test, purchased of said Shields and wife the undivided one-half of the lands in this answer first described, and that on or about that day the said Shields and wife made a conveyance of the same to said Test, and that said deed was duly recorded on the same day in the register's office of Douglas county, in book "I" of deeds, page 206, to which reference is had for greater certainty; and further, that said Test paid to said Shields for said land the sum of three thousand dollars, and that the same was paid in the following

manner, to wit, a large portion of said sum was paid at the time said conveyance was made, and the balance of said sum in less than a week thereafter; that the same was paid part in gold, part in bank bills of specie paying banks, but what proportion of each these defendants are unable to state, except that the said sum of three thousand dollars was actually paid in cash to said Shields for said tract of land at the time aforesaid.

107 And further the said defendant, Test, alleges, and the said defendants, Jefferson P. Cassidy, Nathan P. Dodge, and John T. Baldwin, represent that they are informed and believe, that at the time of said purchase of said lands by said Test from said Shields as aforesaid, and at the time of said payment therefor, and for a long time thereafter, he, said Test, had no knowledge, intimation, information, surmise or belief of any kind or nature whatever of any of the facts alleged in said bill, relative to the alleged fraudulent character of said pre-emption, but the said Test supposed, when he purchased of said Shields, that he, Shields, had in every respect complied with the said act of Congress, and that he, Shields, had pre-empted the same in the utmost good faith, and believing the title to said premises to be good and perfect, and having no knowledge, information, or intimation of any defect in said title of any kind or nature whatever, he, said Test, purchased the same as aforesaid, and paid therefor the said valuable and adequate consideration.

108 And these defendants, James D. Test and John T. Baldwin, and each of them, allege, and the said defendants, Jefferson P. Cassidy and Nathan P. Dodge, represent that they are informed and believe that on or about the 15th day of December, 1857, the said Test and wife did, by deed of conveyance of about that date, sell and convey to said Baldwin, and said Grenville M. Dodge, the undivided one-fourth of the premises first described in this bill, together with the undivided one-half of the lots before referred to in said block 128½, and the said deed was, on the 28th of said month, duly recorded in said book "I" at page 410, to which reference is had, for greater certainty; and further that said Baldwin and Dodge paid to said Test for said lands and alleged lots the sum of two thousand five hundred dollars, and that the same was paid in the following manner, to wit, the said sum of two thousand five hundred dollars was paid in cash at the time of said purchase, and that the same was paid by the said Baldwin and Dodge to the said James D. Test for the premises last above described.

109 And further the said defendant, Test and John T. Baldwin, allege, and the said defendants, Jefferson P. Cassady and Nathan P. Dodge, represent that they are informed and believe that at the time of the purchase of said lands by said Baldwin and Dodge from said Test as aforesaid, and for a long time thereafter, they, the said Baldwin and Dodge, nor either of them, had any knowledge, information, intimation, surmise or belief, hearsay or rumor of any kind or nature whatever of any of the facts alleged in said bill relative to the alleged fraudulent character of said pre-emption, or that said complainant had, or claimed to have, any right, title, or

interest in or to said premises, or any part thereof, either in law or equity, but that the said Baldwin and Dodge supposed and firmly believed that when they purchased said premises of said Test that he, Shields, had in every respect complied with said act of Congress, and pre-empted the same in the utmost good faith, and believing the title to said premises to be good and perfect, and having no knowledge, information or surmise of any defect in said title of any kind whatever, they, said Baldwin and Dodge, purchased the lands aforesaid, and paid therefor said valuable and adequate consideration.

And the said Test and Cassidy, further answering, allege, and the said defendants, Nathan P. Dodge and John T. Baldwin, represent that they are informed and believe that on or about the 8th
110 day of January, 1858, the said Test and wife did, by deed of conveyance of about that date, sell and convey to said Jefferson P. Cassidy the undivided one-eighth of the lands first described in this answer, and that the said was duly executed and acknowledged, and that on the 16th day of said month the same was duly recorded in said book "I" at page 509, to which reference is had for greater certainty; and further, that said Cassidy paid to said Test for said lands the sum of five hundred dollars, and that the same was paid in the following manner, to wit, that the same was paid in cash at the time said purchase was made by said Jefferson P. Cassady to said James D. Test for the said undivided one-eighth of the premises first described in this answer.

And further said defendants, Test and Cassidy, allege, and the said defendants, Nathan P. Dodge and John T. Baldwin, represent that they are informed and believe that at the time of the purchase of said lands by said Cassidy from said Test as aforesaid, and for a long time thereafter, they, the said Test and Cassidy, nor either of
111 them, had any knowledge, information, intimation, surmise, or belief, hearsay or rumor, of any kind or nature whatever of any of the facts alleged in said bill, relative to the alleged fraudulent character of said pre-emption, or that said complainant had, or claimed to have, any right, title, or interest in or to said premises, or any part thereof, either in law or in equity, but that the said Test and Cassidy supposed and firmly believed, when the said Cassidy purchased of said Test, as aforesaid, the undivided one-eighth of the land first described in this answer, that said Shields had in every respect complied with said act of Congress, and pre-empted the same in the utmost good faith, and believing the title to said premises to be good and perfect, and having no knowledge, information, or surmise of any defect in said title of any kind whatever, the said Cassidy purchased the lands aforesaid, and paid therefor said valuable and adequate consideration.

And these defendants, John T. Baldwin and Nathan P. Dodge, and each of them allege, and the said defendants, James D. Test and Jefferson P. Cassady, and each of them represent that they
112 are informed and believe that on or about the tenth of December, 1859, the said Grenville M. Dodge and John T. Baldwin did, by deed of conveyance properly executed and acknowledged

of about that date, sell and convey to said Dodge the undivided one-fourth of the lands first herein described, together with the lots aforesaid, and that on the 12th day of said month the said deed was duly recorded in book "L" of deeds in said register's office at page 599, to which reference is had for greater certainty; and further, that Nathan P. Dodge paid to said Grenville M. Dodge and John T. Baldwin for said premises the sum of dollars, and that the same was paid in the following manner, to wit, a part at the time of the making of said deed, but what portion the said Dodge is unable to state with certainty, and the balance within a short time after the making of said deed, but at what precise time he does not recollect, but can only say that the same was paid before he had any knowledge, or information, or intimation of a defect in the title to the premises first described in this answer.

113 And further said defendants, Baldwin and Nathan P. Dodge, and each of them, allege, and the said defendants, James D. Test and Jefferson P. Cassady, represent that they are informed and believe that at the time of the purchase of said lands by said Nathan P. Dodge from said Grenville M. Dodge and Baldwin, the said Baldwin and Dodge, nor either of them, had any knowledge, information, surmise, or belief, hearsay or rumor of any kind or nature whatever of the facts alleged in said bill in relation to the alleged fraudulent character of said pre-emption, or that said complainant had, or claimed to have, any right, title, or interest in or to said premises or any part thereof, either in law or equity, but that the said Nathan P. Dodge supposed and believed when he purchased said premises of said Baldwin and Dodge, that he, Shields, had in every respect complied with said act of Congress, and had acquired title to the same in the utmost good faith, and believing the title to said premises to be good and perfect.

114 And the said defendant, John T. Baldwin, further answering, alleges, and the said James D. Test, Jefferson P. Cassidy and Nathan P. Dodge, and each of them, represent that they are informed and believe that on or about the 2nd of December, 1857, the said Shields and wife did, by a deed of conveyance duly executed and acknowledged, sell and convey to said Baldwin the undivided one-half of said lots in said block 128½, and that the said deed was on the same day duly recorded in said book "I" at page 265, to which reference is had for greater certainty, and further that said Baldwin paid to said Shields for said premises the sum of five hundred dollars, and that the same was paid in the following manner, to wit: that the said sum of five hundred dollars was paid in cash down by the said Baldwin to said Shields for said premises last described at the time of the making of said deed.

And further the said Baldwin alleges, and the said James D. Test, Jefferson P. Cassady, and Nathan P. Dodge, represent that they are informed and believe that at the time of the purchase of said premises by said Baldwin from said Shields as aforesaid, and for a long time thereafter, he, the said Baldwin, had no knowledge, information, intimation, surmise or belief, hearsay or rumor of any kind or

115 nature whatever of any of the facts alleged in said bill, relative to the alleged fraudulent character of said pre-emption, or that said complainant had or claimed to have any right, title or interest in or to said lands or any part thereof, either in law or in equity, but that the said Baldwin supposed and firmly believed when he purchased said premises of said Shields, that he, Shields, had in every respect complied with said act of Congress, and pre-empted said land in the utmost good faith, and believing the title to said premises to be good and perfect, and having no knowledge, information or surmise of any defect in said title of any kind whatever, the said Baldwin purchased the premises aforesaid, and paid therefor said valuable and adequate consideration.

And said defendants and each of them, further answering, admit that when they purchased the said premises as aforesaid they had no notice of any fraudulent practices on the part of said Shields in pre-empting said lands, and further admit that they claim to be bona-fide purchasers of the interest respectively claimed by them
116 in said lands, and further admit that they claim the protection of this honorable court as such innocent purchasers without notice. And these defendants and each of them deny that the contrary thereof is true as alleged in said bill, but these defendants admit that they have had some acquaintance with said Shields, and have had conversations with him, but these defendants now have no remembrance as to the nature of such conversations. But these defendants deny that they or either of them were particularly, intimately and confidentially informed and advised of said Shields' business arrangements, plans and purposes, as in said bill alleged, and further deny the allegation in said bill that long before it was by others residing in the vicinity of the lands in question known that said Shields intended to pre-empt said lands, they, the said Cassidy and Test, were informed and knew of said Shields' intention to pre-empt said lands in his name as ostensibly in his behalf, but in
117 reality and in fact for said Cassidy and Test; and these defendants and each of them deny specifically all these allegations of said bill, and further deny that said Cassady and Test or either of them had anything to do with said register and receiver or either of them, or asked, or received from them any information whatever in regard to any anticipated pre-emption of said lands by said Shields. And these defendants and each of them further deny that they or either of them had anything to do with the purchase of said lots, as alleged in said bill, or in any other manner, and further deny that they or either of them required or directed said Beeson to convey the aforesaid lots to said Shields, or to said Cassidy and Test, or to either of them, or to anybody else; and further deny that said Cassidy and Test or either of them did, at the day said Shields entered said lands or at any other time, hold the title to said lots.

And these defendants and each of them, further answering, say they have no knowledge or information, save from the allegations
118 of said bill, whether in the month of September, 1857, or at any other time, said Francis Edwards was seized of or other-

wise entitled to lot number one in fractional section number five, in township thirteen north of range ten east, and lots number five and seven, and the southeast quarter of the southeast quarter of fractional section number thirty-two, in township fourteen north of range ten east of the sixth principal meridian; nor whether on or about said day one Richard O'Brien was in like manner seized or entitled to the northwest quarter of section eleven in township thirteen north, range ten east; nor whether on or about said day one Thomas Hawes was in like or any other manner seized or entitled to the southeast quarter of section number ten in the township and range last aforesaid; but these defendants and each of them therefore leave said complainant to his proofs of all such allegations.

And these defendants and each of them, further answering,
119 say, that they have no knowledge or information whether said Shields purchased said several pieces or parcels of land from the said parties, save only from the allegation; and these defendants therefore leave said complainant to his proof of such allegation.

And the said defendants, Baldwin, Dodge and Cassidy, further answering, say they have no knowledge, information or belief, save only from what appears from the allegations of said bill, whether said parties or said Shields were or was indebted to the said Cassidy and Test, or to any person or persons for whom the said Cassidy and Test were agents or otherwise; or whether the said parties, under the direction of said Shields or anybody else, in order to secure such alleged indebtedness, conveyed said several parcels of land, or any part thereof to said Cassidy and Test or either of them, or to their alleged principals, or to anybody else, nor whether the said Cassidy and Test or either of them, in their own name, or in the name or names of their said alleged principal or principals, or anybody
120 else, made a writing or writings obligatory, or any other writing or instrument, conditioned to convey the said lands to said Shields, or his wife, or any other person, whenever he, the said Shields, should pay the aforesaid indebtedness, and therefore these defendants and each of them deny all such allegations of said bill, and leave said complainant to his proofs thereof.

And the said defendants, Cassidy and Test, and each of them, in answer to said allegations of said bills, say: And the said Cassidy and Test say that they deny the allegations in said bills; that the said parties or either of them were indebted to said Cassidy and Test, or either of them, but these defendants cannot say whether or not said parties were or were not indebted to a person or persons for whom the said Cassidy and Test were agents; but they have no knowledge or information on the subject, save from what appears from said bills, and further deny that said parties, or said Shields, ever conveyed to them or either of them any lands or parcels of land for the purpose of securing any alleged indebtedness, as
121 charged in said bill, or to their principals; and they further deny that they, or either of them, either in their own or in the name or names of anybody else, made the alleged writing or writings obligatory, as charged in said bill, conditioned to convey

said lands or any other lands to said Shields, or to his wife, or to anybody else, at any time or in any manner whatever, all of which charges of the bill these defendants, and each of them, specifically deny it, and leave the complainant to his own proofs thereof.

And the said defendants, Cassidy and Test, and each of them, in answer to the interrogatories of said bill say, that they were aware of the fact that said Shields, as well as a large number of other persons in said Douglas county, with the intention of pre-empting said lands under the act of Congress, settled upon and improved the same; and these defendants believe that they were informed that said Shields meditated the pre-emption of the lands first described in this answer, and the entering of the same at the aforesaid land
122 office, and they believe they were informed of that fact as early if not earlier than the month of September, 1867; but these defendants further say, that they had no more knowledge or information relative to the intention of said Shields in the premises than what they acquired casually, or any more than they had in relation to other persons seeking to pre-empt lands in said county. But these defendants, and each of them, distinctly deny that they or either of them applied to the officers or anybody else connected with said land office to learn anything relative to the pre-emption of said lands by said Shields; and further say that they gave no information whatever to said land officers on that subject, and that they the said defendants, nor either of them, had any knowledge, information or belief as to whether said Shields would be permitted to pre-empt said lands or not.

And these defendants and each of them deny that they, or either of them, were present at said office at the time when said Shields proved his right to pre-empt said lands; but these defendants
123 have no recollection and cannot say whether they or either of them were or was in said city of Omaha on the day when said lands were pre-empted, or whether they or either of them saw said Shields on that day; but these defendants and each of them say they have no remembrance of having consulted or conversed with said Shields in regard to his proving his right to enter and his entering said lands as aforesaid, but these defendants and each of them verily believe they had no such conversation or consultation, and therefore deny the same; nor have these defendants or either of them any remembrance whether they or either of them were in the city of Omaha on the day following the pre-emption of said lands, but say they might have been there, as they frequently had business with divers persons in Omaha at, before, and since that time.

And further, these defendants and each of them say, they may have had a conversation or even conversations with said Shields in regard to the said entry and said lands, but that if any such conversation
124 or conversations were had, they occurred in a casual manner, and as one man frequently converses with another upon matters generally, simply for the sake of conversation, without any particular object in view; but these defendants have no recollection

whatever of what was said by either said Shields or either of these said defendants in said conversation or conversations, if any were had.

And further, these defendants and each of them deny that said Francis Edwards, Richard O'Brian and Thomas Hawes, or either of them, did convey to said Cassady and Test, or either of them, or to any person or persons under their direction, the lands aforesaid, or any part or parcel thereof as alleged in said bill, or in any other manner, and further deny that the said Cassady and Test, or either of them, in their own name or in the name of anybody else for them, did make to said Shields or his aforesaid wife their bond or bonds, or any other writing of any kind whatever, or any oral promise, by which said Cassady and Test, or either of them, obligated themselves or either of them, to convey said premises or any part
125 thereof to any person whomsoever; and these defendants and each of them say they have no such bond or bonds as alleged in said bill in their possession or under their control, and never had, or any other bonds or writings relating to the matters charged in said bill, and they therefore have nothing to deposit in the register's office on that subject.

☞And these defendants and each of them, further answering say, that they have had no transaction or dealing with said Shields relative to the matters charged in said bill concerning said pre-emption, or in anywise or manner relating thereto, nor on account of any other person or persons in the manner inquired after in the interrogatories to said bill. And further, these defendants and each of them say they have no books of original or other entries in their possession or under their control, or in the possession or under the control of either of them, containing any entry or entries of any kind, character or nature whatever, with said Shields, or with any person or persons
126 for him; and these defendants therefore are unable to furnish the said complainants with any information on this subject, but are compelled to leave the complainant to his proofs of his various allegations in said bill.

And these defendants further answering say that they are informed and believe that Officer & Pusey, of Council Bluffs, Iowa, a firm doing business there, claim some interest in the premises first above described, as mortgagees of the same or a part thereof, and these defendants therefore suggest to the court that there is a defect of parties in this suit.

127 And these defendants, and each of them, deny all and all manner of unlawful combination and confederacy wherewith they or either of them stand charged in said bill, without this that there is any other matter, cause or thing in said complainants' said bill of complaint contained, material or necessary for these defendants or either of them to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and denied or avoided, is true to the knowledge or belief of these defendants; all which matters and things these defendants and each of them are ready to aver, maintain and prove as this honorable court shall direct,

and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

(Signed) REDICK & BRIGGS,
Solicitors for the Defendants.

Test: CASSIDY, BALDWIN & N. P. DODGE.

128 STATE OF IOWA, *Pottawattamie County, ss:*

John T. Baldwin, being by me duly sworn, deposes and says that he is one of the defendants named in the above answer; that he has heard the said answer read and knows the contents thereof, and the several matters and things therein stated are true of his own personal knowledge, except as to those matters and things therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) JOHN T. BALDWIN.

Subscribed in my presence, and sworn to before me, this 10th day of June, A. D. 1864.

J. M. PALMER,
Notary Public.

STATE OF IOWA, *Pottawatamie County, ss:*

Nathan P. Dodge, being duly sworn, deposes and says, that he is one of the defendants named in the answer above; that he has read the said answer and the contents thereof, and the several matters and things therein stated are true as he verily believes, except as
129 to those matters and things therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) NATHAN P. DODGE,

Subscribed and sworn to before me, this 10th day of June, A. D. 1867.

J. M. PALMER,
Notary Public.

STATE OF IOWA, *Pottawattamie County, ss:*

Jefferson P. Cassidy, being duly sworn, deposes and says, that he is one of the defendants named in the above answer; that he has heard the said answer read and knows the contents thereof, and the several matters and things therein stated are true of his own personal knowledge, except as to those matters and things therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) J. P. CASSADY,

Subscribed in my presence and sworn to before me, this 10th day of June, A. D. 1864.

J. M. PALMER,
Notary Public.

130 STATE OF IOWA, *Pottawattamie County, ss*:

I, E. F. Burdick, clerk of the District Court in and for said county and State, do hereby certify that J. M. Palmer, before whom the foregoing affidavits of John T. Baldwin, Nathan P. Dodge, and J. P. Cassady were made, and who had hereunto signed his name, was at the date of his so doing a notary public in and for said county, duly commissioned and qualified, and to his acts as such full faith and credit are due and ought to be given; that I am well acquainted with his handwriting, and believe the signature thereto is genuine. And I certify that the court of which I am clerk is a court of record.

In testimony whereof I have hereunto subscribed my hand and affixed the seal of said court at my office in Council Bluffs, in said county, this 10th day of June, A. D. 1864.

(Signed) E. F. BURDICK, *Clerk.*

Endorsed: No. 266. In District Court, Douglas county. In chancery. Aaron Root, complainant *vs.* John T. Baldwin *et al.*, defendants. Joint and several answers of Baldwin, Test, Casady, and N. P. Dodge. Filed June 11th, 1864. J. H. Kellom, clerk, by H. M. Dickenson, dept. clerk. Redick and Briggs, solicitors for said defendants.

131 TERRITORY OF NEBRASKA, *County of Douglas*:

James D. Test, being duly sworn, says he is one of the defendants in the foregoing bill, that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those he believes it to be true.

JAMES D. TEST.

Subscribed and sworn before me this 6th day of October, 1865.

WM. KELLOGG, JR., *Clerk.*

Filed June 11, 1864.

J. H. KELLOM, *Clerk.*
By H. M. DICKINSON,
Deputy Clerk.

And afterwards, to wit, on the 11th day of June, A. D. 1859, there was filed in the office of the clerk of said court the answer and disclaimer of Greenville M. Dodge, one of said defendants, in words and figures as follows, to wit:

132 In District Court, Douglas county, in chancery.

AARON ROOT, complainant,
vs.
JOHN F. BALDWIN *et al.*, def'ts.

Answer and disclaimer of Greenville M. Dodge, one of said defendants, to the bill of complaint of said complainant.

The said defendant says that he is in no way or manner interested in this suit or in the result thereof; that he claims no interest, right,

lein, or any estate whatever in or to the premises first described in said bill or any part thereof; and this defendant denies all unlawful combination and confederacy with which he stands charged in said bill. And this defendant prays hence to be dismissed with his costs in this behalf most wrongfully sustained.

REDICK & BRIGGS,
Solicitors for Defendants.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

Clinton Briggs, being by me first duly sworn, deposes and says that he has read the above answer and disclaimer, and knows the contents thereof, and that the same is true as he verily believes, and that the affiant is one of the solicitors for said def't, who is a non-resident of and absent from said Territory at the time.

Filed June 11, 1859.

J. H. KELLOM, *Clerk.*
By H. M. DICKINSON, *Dep't. Clerk.*

Subscribed in my presence, and sworn to before me this 11th day of June, 1864.

J. H. KELLOM, *Clerk.*
By H. M. DICKINSON,
Deputy Clerk.

133 And afterwards, on the 11th day of July, A. D. 1864, there was filed in the office of the clerk of said county the replication of Aaron Root, complainant, in words and figures as follows, to wit:

In chancery.

The replication of Aaron Root, complainant, to the answer of John P. Baldwin, Nathan P. Dodge, James P. Cassady and James D. Test, defendants.

This repliant, now and at all times hereafter saving to himself all right and advantage of exception to the many errors, uncertainties, and imperfections of the said answer, for replication thereunto says he will aver, maintain and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer is uncertain, untrue, and insufficient to be replied unto, without that any matter or thing in the said bill not herein and hereby well and sufficiently replied unto, confessed, and avoided, traversed or denied, is true to the knowledge and belief of this repliant, all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and prays as in and by his said bill he has already prayed.

Filed July 11, 1864.

JAMES M. WOOLWORTH,
Sol'r for Comp'l't.
J. H. KELLOM, *Register.*

134 And afterwards, to wit, on the 11th day of August, A. D. 1864, there were interrogatories filed in the office of the clerk of said court in words and figures as follows, to wit:

135 Interrogatories to be propounded to Mathew J. Shields, Jonathan Edwards, Look, and Samuel B. McCunn, of Sharpy county, N. T., witnesses to be produced, sworn and examined in pursuance of the annexed commission on the part of the complainant in a certain cause depending in the District Court, in chancery, of the Territory of Nebraska, for the first judicial district and county of Douglas, between Aaron Root, complainant, and Robert Shields and others, defendants.

First interrogatory. What is your name, age, occupation, and place of residence, and how long have you resided in the place of your present residence?

Second interrogatory. Are you acquainted with Robert Shields; if so, how long have you known him?

Third interrogatory. Where has the said Shields resided since you have known him?

Fourth interrogatory. State whether or not the said Shields ever owned any land since you have known him; if so, when and how did he become possessed of it, what is a description of the same, and what improvements, if any, did he ever make thereon, and when did he make the same.

136 Fifth interrogatory. Do you know, if so state, whether or not the said Shields ever designed or intended to pre-empt from the United States any of the land described by you; state your means of knowledge.

Sixth interrogatory. Do you know, if so state, whether or not the said Shields ever had any dealings or transactions with Messrs. Cassady and Test, of Council Bluffs, Iowa; if so, state fully when the same commenced, how long they continued, and what the same were?

Last interrogatory. Do you know any other matter or thing material to the interest of the complainant in this cause; if so, declare the same as fully as if the same were here particularly inquired after.

JAMES M. WOOLWORTH,
Sol'r for Comp'l't.

Commissioner on the part of the comp'l't, William B. Watson, esq., probate judge of Sharpy co., N. T.

Filed Aug. 11, 1864.

J. H. KELLOM, *Reg'r.*

And afterwards, to wit, on the 16th day of August, 1864, there were cross-interrogatories filed in the clerk's office of said court in words and figures following, to wit:

137 Cross-interrogatories to be propounded to Mathew J. Shields, Jonathan Edwards, Look, and Samuel B. McCunn, of Sharpy county, N. T., witnesses to be produced and examined in pursuance of the annexed commission on the part of the complainant, in a certain cause pending in the District Court, in chancery, of the Territory of Nebraska, for the first judicial district and county of Douglas, between Aaron Root, complainant, and Robert Shields and others, defendants.

Cross-interrogatory 1st to Matthew J. Shields. Are you the brother of Robert Shields? Has not you and your brother Robert had a long continued difficulty, and is there not at this time a bitter enmity existing between you and him? Will you swear that he had a title to the land mentioned by you at the time he pre-empted the property in dispute? In answering this question I want you to speak from your own personal knowledge, and not from hearsay.

2d interrogatory. What interest have you in the result of this suit or what promise of fee or reward have you had from Mr. Woolworth, or other person, and who is to pay the expense of your time and trouble in attending this examination and giving your testimony, and what reason have you for volunteering your testimony to

138 defeat your brother in the title to his land?

The defendants object to the fourth direct interrogatory on the ground that it is not the best evidence.

(The defendants object to the fifth interrogatory on the ground that it calls for the opinion of the witness as to the intentions of the party, instead of stating the facts, that the court might draw its own conclusion.)

Interrogatories to be propounded to Samuel B. McCunn:

State what you know in regard to the intention and determination of Robert Shields to pre-empt the land in dispute, and what you know about the Omaha Claim Club driving him from the land, and do not you know that at one time he was compelled to abandon that land from fear of said club. Please state all you know in that regard.

Filed Aug. 16, 1864.

J. H. KELLOM, *Reg'r.*

And afterwards, to wit, on the 25th day of August, A. D. 1864, there was issued out of the office of the clerk of said court a commission to take depositions, to William Watson, esq., in words and figures as follows, to wit:

139 The District Court of the first judicial district of the Territory of Nebraska, within and for the county of , Territory of Nebraska, to William Watson, esq'r, probate judge of Sharpy county, Neb. Ter., greeting:

Know you that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize and require you to examine upon interrogatories annexed to this commission, Mathew J. Shields, Jonathan Edwards, Look,

and Samuel B. McCunn, in a certain case pending in this court wherein Aaron Root is complainant, and Robert Shields *et al.* defendants, on oath, to be by you administered, to take and certify the depositions of the said witnesses, and return the same, in accordance with the statute in such case made and provided.

Witness the Hon. Wm. P. Kellogg, judge of the first judicial district, at the city of Omaha, on the 25th day of Aug., A. D. 1864.

[SEAL.] J. H. KELLOM, *Clerk.*

And afterwards, to wit, on the day of , 186 , the above commission was returned, with the following depositions thereto attached, to wit:

140 *Depositions of witnesses produced, sworn, and examined by and before the undersigned commissioner, under and in pursuance of the commission hereto annexed and to me directed, issued out of the District Court, in chancery, of the Territory of Nebraska, for the first judicial district and county of Douglas, in a certain cause depending therein between Aaron Root, complainant, and Robert Shields and others, defendants.*

Thomas D. Look, being first duly sworn by me, the undersigned commissioner, to speak the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposes; and in answer to the first direct interrogatory, he, answering, saith: Thomas D. Look; thirty-nine; farmer; Forrest City precinct; Sarpy county, three years.

To the second direct interrogatory, he, answering, says: I am; have known from the time I came here, which was in eighteen hundred and sixty-one.

To the third direct interrogatory, he, answering, says: He resided on section ten, T. 13, R. 10 E., until May, 1862.

To the fourth direct interrogatory, he, answering, says: I understood him to claim the land on which he lived, and three-

141 fourths of timber, known as the Bob Shields' timber, which I understand to be one hundred and twenty acres. I think there was three hundred and twenty acres in the tract on which he lived, which is on section ten and eleven, in township thirteen north of range ten east, in this county. He had some sixty acres fenced, and I should think about forty acres broke; had a house, of one log room and one frame room, one story; had likewise a frame building he called a grainary, one and a half story high, I think thirteen by sixteen feet. The improvements were all made before I came here.

To the fifth direct interrogatory, he, answering, says: I do not know.

To the sixth direct interrogatory, he, answering, says: I do not know.

To the last direct interrogatory, he, answering, says: Shields' timber claim, I think, was on section five, town. thirteen, of range ten, and on section thirty-two, in town. fourteen north, of range ten east. He cut quite a quantity of saw-logs and rail timber in the winter of 1861 and 1862. He sold the saw-logs to the Weeth boys in the

spring of 1862; he sold just before he left. The frame part
142 of his dwelling house and the granary and the fencing; the fencing he sold James Dimock; the granary to Tom Tumblety; the frame part of the dwelling house was taken off by a man by the name of Barder.

THOMAS D. LOOK.

Mathew J. Shields, being first duly sworn by me, the undersigned commissioner, to speak the truth, the whole truth, and nothing but the truth, as hereinafter certified, and in answer deposes and says:

In answer to the first direct interrogatory: Matthew J. Shields; thirty-nine; farmer; Forrest City, Sarpy county, Nebraska; eight years last October.

To the second direct interrogatory, he, answering, says: All his life.

To the third direct interrogatory, he, answering, says: From February, 1858, to May, 1862, he lived at Forrest City, town. 13 north, range ten east, on section ten, the southeast quarter. He came there from Saratoga, Douglas county. He lived in Omaha before going to Saratoga.

To the fourth direct interrogotory, he, answering, says: He had two claims; one the southwest quarter of section ten, and the southwest quarter of eleven, in town. thirteen, range ten, containing three hundred and twenty acres. The other was in lots in frac-
143 tional section thirty-two, town. fourteen, range ten, and on section five, town. thirteen, range ten. The whole tract, one hundred and thirty-two acres. Only about sixty acres of timber, of which he owned one undivided half; he owned the land at least six months before he moved out here. He fenced some forty acres, and put up a shanty in the spring of 1858; he built a granary, and dug a well afterwards.

To the fifth direct interrogatory, he, answering, says: I do not know.

To the sixth direct interrogatory, he, answering, says: I do not.

To the last direct interrogatory, he, answering, says: There were no other improvements on these lands, except what he made; no one claimed to own this land but him.

To the first cross-interrogatory, he, answering, says: I am. No; Bob and I were not on very good terms for some time before he went away. Nothing very particular; he provoked me when he went away. I would have done as much for him as ever. I do not know who held the title.

To the second cross-interrogatory he, answering, says: No, sir; no one has promised me anything for testifying for this suit.
144 I do not know who is to pay expenses of this examination. I have not volunteered to testify.

M. J. SHIELDS.

Jonathan Edwards, being first duly sworn to speak the truth, the whole truth, and nothing but the truth, answering—

To the first direct interrogatory says: Jonathan Edwards; a farmer; Forrest City precinct, Sarpy county; have lived here since last June; six years ago.

To the second direct interrogatory, says: Have known him ever since I have been here, as long as he resided here.

To the third direct interrogatory, he, answering, says: He lived on the southeast quarter of section ten, in town. thirteen, range ten, from the time I came here until the time he went away.

To the fourth direct interrogatory, he, answering, says: He told me of purchasing it and giving a big price for the claim; that he purchased the claim before the land came into market; that he could not pre-empt it himself, but procured others to pre-empt it for him. The land claimed was said southeast quarter of section ten, and the south-
west quarter of section eleven, town. and range mentioned
145 above. The house was built and the breaking mostly done when I came here, and the fence in progress of building; he was building the fence; he had the most of the land broken in cultivation while he lived here.

To the fifth direct interrogatory, he answering, says: He could not pre-empt it.

To the sixth direct interrogatory, he answering, says: I do not.

To the last direct interrogatory, he answering, says: Not that I am aware of.

JONATHAN EDWARDS.

Samuel B. McCunn, being first duly sworn to speak the truth, the whole truth, and nothing but the truth, answering—

To the first direct interrogatory, answering, says: Samuel B. McCunn; a farmer; residence Forrest City, Sarpy county, Nebraska; I was first in 1856 and 1857; then was absent awhile. Have been there tolerably about four years.

To the second direct interrogatory he, answering, says: I have known him ever since 1856 until he left.

To the third direct interrogatory he, answering, says: When I first knew him he lived in Omaha; afterwards he lived in Forrest City precint.

146 To the fourth direct interrogatory he, answering, says: He owned land in section ten, town. thirteen north of range ten east; he claimed to own three hundred and twenty acres; he owned the claim title before the pre-emption was made, and afterwards held under the pre-emptor; had a one-story log house; he put up a small frame addition. As near as I can recollect there was some fifty acres under fence and improvement; he had the undivided three-fourths of some sixty acres of timber land near the mouth of Elkhorn river.

To the fifth direct interrogatory he, answering, says: I do not know as to that.

To the sixth direct interrogatory he, answering, says: I know this much, that I demanded a deed from him of my fourth of the timber,

and I found in conversation with him that he could not give it; then went with me to Cassidy & Test in Council Bluffs, and they gave me a deed; he directed them to do so.

To the last direct interrogatory he, answering, says: No.

To the cross-interrogatory, he answering, says: All I know about that is that he told me he intended to pre-empt that land; do not know that the claim club drove him off.

SAMUEL B. McCUNN.

147 STATE OF NEBRASKA, *County of Sarpy, ss:*

I, William R. Watson, probate judge of said county, the commissioner named in the annexed commission, do hereby certify that Thomas D. Look, Matthew J. Shields, Jonathan Edwards, and Samuel B. McCunn, were first by me severally sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition of each of said witnesses was by me reduced to writing in his presence, and by such witness thereupon, and at the time of taking the same, subscribed in my presence.

Witness my hand this 17th day of December, A. D. 1864.

WILLIAM R. WATSON,
Probate Judge.

And afterwards, to wit, on the 13th day of September, 1864, there were interrogatories filed in the office of the clerk of said court, in words and figures as follows, to wit:

148 Interrogatories to be administered to John Beeson, a witness to be produced, sworn and examined, under and in virtue of the commission hereto annexed issued out of the District Court in chancery of the Territory of Nebraska for the first judicial district and county of Douglass, in a certain cause depending therein wherein Aaron Root is complainant and Robert Shields and others are defendants.

First interrogatory. What is your name, age, occupation, and residence.

Second interrogatory. State whether or not you did ever buy from the said Robert Shields any real property at or near the city of Omaha. If yea, when, for what sum by you paid therefor, and what was the same.

Third interrogatory. State whether or not you ever sold the premises so by you purchased from the said Shields. If so, when, and to whom, and for what sum, and who negotiated the same on behalf of the purchase, where and when was such negotiation had, who paid you for the said premises, and when and how was the purchase money paid.

Fourth interrogatory. Where did you and where did the said Shields, respectively, reside between the time of your purchase and the said sale of said premises?

149 Last interrogatory. If you know any other matter or thing

material to the matters in question in this suit, declare the same as fully as if they where here particularly inquired after.

Commissioner for claimant, Edward Beeson, Fon du Lac, Wisconsin.

Filed September 13, 1364.

J. H. KELLOM, *Register*.

And afterwards, to wit, on the 26th day of September, A. D. 1864, there was issued out of the office of the clerk of said court a commission to take depositions to Edward Beeson, esq., in words and figures as follows:

150 The District Court of the first judicial district of the Territory of Nebraska, within and for the county of Douglass, to Edward Beeson, Fon du Lac, Wisconsin, greeting:

Know you that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize and require you to examine, upon interrogatories annexed to this commission, John Beeson, esq., in a certain cause pending in this court, wherein Aaron Root is complainant, and Robert Shields and others are defendants, on oath to be by you administered, to take and certify the depositions of the said witnesses, and return the same in accordance with the statute in such case made and provided.

Witness the Hon. William P. Kellogg, judge of the District Court of the first judicial district, at the city of Omaha, on the 26th day of September, A. D. 1864.

[SEAL.] J. H. KELLOM, *Register*.

Endorsed: No. 266. District Court, Douglass county. Aaron Root *vs*. Robert Shields *et al*. Commission to take depositions.

And afterward, to wit, on the day of , 186 , the above commission was returned with the following depositions thereto attached, to wit:

151 *Deposition of John Beeson, a witness introduced, sworn, and examined under and in virtue of the commission hereto annexed.*

John Beeson, being duly sworn by me, the undersigned commissioner, to testify to the truth, the whole truth, and nothing but the truth—

To the first interrogatory he answering, says: My name is John Beeson; age, 46; occupation, grocer; residence, Fon du Lac, Wisconsin.

To the second interrogatory he answering, says: In June, 1856, I purchased from Robert Shields the house and lots north of Omaha, being parts of block —. I have no means of knowing or remembering the number of or part of the block. I have had my deed recorded in the register's office in Omaha. He warranted the title against all but the government. I paid him $1,100 for the property.

To the third interrogatory he answering, says: I sold the property back to in 1857 for $2,000 00. Said Shields negotiated the purchase at Omaha at or about the time it was made, and I was paid through parties residing in Council Bluffs, Iowa. Their names I do not remember.

To the fourth interrogatory he answering, says: I lived on
152 the premises, in the house I purchased of him. I think he never lived in the house before I purchased of him. He lived a part of the time in Omaha.

To the last interrogatory he answering, says: I do not now think of anything further that I deem material in the case.

JOHN BEESON.

STATE OF WISCONSIN,
County of Fon du Lac, City of Fon du Lac, ss:

I, Edward Beeson, the commissioner named in the annexed commission, do hereby testify that on the 21st day of November, 1864, at the city, county, and State aforesaid, I swore John Beeson to testify the truth, the whole truth, and nothing but the truth; that thereupon his deposition above was reduced to writing by J. I. Beeson, who was a proper person for the purpose, and who was not and is not a relative of or attorney for either party, or otherwise interested in the result of this suit; and said deposition was written in my presence, and was by said John Beeson subscribed in my presence. All of what was done on the day and place last aforesaid.

Witness my hand this 21st day of November, 1864.

EDWARD BEESON, *Commissioner.*

153 And afterwards, to wit, on the 28th day of August, A. D. 1865, there was entered of record an order of reference, in words and figures as follows, to wit:

AARON ROOT
vs.
ROBERT SHIELDS *et al.* } Original bill.

JAMES WOODS *et al.*
vs.
AARON ROOT *et als.* } Cross bill.

JOHN P. HELFENSTEIN *et al.*
vs.
AARON ROOT *et al.* } Cross bill.

On motion of J. M. Woolworth, solicitor for Aaron Root, it is ordered that these causes be referred to George W. Doane, as special master and examiner, who is hereby appointed for the purpose, to hear, take, and report to the court the proofs of the parties to said causes. The testimony taken under this order shall be reported to

the court on or before the day to which the present sitting may be adjourned.

W. F. LOCKWOOD, *Judge.*

Filed Aug. 28th, 1865.

J. H. KELLOM, *Reg'r.*

154 And afterwards, to wit, on the 26th day of October, A. D. 1865, there was entered of record an order dismissing the cross bill in which John P. Helfenstein and others are complainants, in words and figures as follows, to wit:

District Court Douglas county, in chancery.

JOHN P. HELFENSTEIN *et al.*
vs.
AARON ROOT *et al.*

And now comes the said John P. Holfensten, Stephen D. Gore, Thomas J. Slaughter, and Charles S. Kintzing, complainants, in the cross bill filed in the cause of Aaron Root *et al. vs.* Robert Shields *et al.*, and by leave of the court first had and obtained, dismiss the said cross bill and proceedings thereon without prejudice.

W. KELLOGG.

Filed October 24th, 1865.

WM. KELLOGG, JR., *Register.*

And afterwards, to wit, on the day of , 1866, there was filed in the office of the clerk of said court certain depositions in words and figures as follows, to wit:

155 *Depositions of witnesses taken in a certain case pending in the District Court of Douglas county, Territory of Nebraska, in chancery, wherein Aaron Root is complainant and Robert Shields et al. are defendants, in pursuance of an order of reference made in said cause at the April term of said court, A. D.* 1865.

And now at this day, to wit, May 16th, 1865, by the consent and agreement of the solicitors of the respective parties, the examination of witnesses in said cause is had at my office, in the city of Omaha, Douglas county, aforesaid, at which time and place J. M. Woolworth, esq., appears as solicitor for complainant, and Redick & Briggs as solicitors for defendants, Cassidy and Test and Baldwin and Dodge, and A. J. Poppleton as solicitor for deft's, Helfeinstein, Gore & Co.

156 "Lorin Miller, sworn as a witness for complainant, Aaron Root, being first duly sworn according to law, deposes in answer to interrogatories as follows:

Interrogatory 1st. What was your business in the years 1855 to 1857, and where did you carry on the same?

Ans. I was a land surveyor, and carried on my business in the Territory of Nebraska.

Int. 2d. State whether or not during that you knew period an association known as the Omaha City Company.

Ans. I did.

Int. 3. Who were its principal members, and what was its object?

Ans. J. M. Love, Enos Lowe, Jesse Lowe, J. B. Cumming, M. Foot, C. J. A. Jackson, J. M. Palmer, and Samuel S. Baylis. Its object was to lay certain lots of land or claims into an addition to the city of Omaha, dividing it into lots, blocks, streets, and alleys.

Int. 4. What lands were claimed by them for this purpose?

(Objected to as immaterial by Redick & Briggs, sols. for a portion of the defendants, and because it will hereafter appear that those men sought to usurp and keep from public use and pre-emption a large number of acres of land by force, intimidation, and fraud, and by and through a power known as the Omaha Claim Club.)

157 Ans. I cannot remember all of them; some of them I can remember; I have a list of them, but not with me. There were the Clancy claim, the Hepnet claim, the Winn claim, the Wagstaff claim, the Weir claim, the Jeffries claim, a portion of it, and a portion of the Gaylord claim, and a portion of the Harrison Johnson claim. In all there were about eighteen hundred acres, and divided into about eight thousand lots, or a little over.

Int. 5. State whether or not sections ten and fifteen, (10 and 15,) town. 15, range 13, formed a part of these claims.

Ans. When I surveyed it there were no government divisions made of the lands. In 1856 or 1857 the government survey was made of the lands, and on examination I then found that part of sections ten and 15 included a portion of this survey.

Int. 6. Describe, if you can, the parts of those sections included in the claims mentioned by you.

Ans. The NE $\frac{1}{4}$ of sec. 15, and the NW $\frac{1}{4}$ of the same sec. 15, and the S $\frac{1}{2}$ of sec. 10, and also a part of the N $\frac{1}{2}$ of sec. 10.

Int. 7. You speak of surveying these lands. When, for whom, and in what manner did you made such survey?

Ans. In 1855, and resurveyed certain portions of said lands in 1856 for the Omaha City Co. named above. I surveyed them into blocks of 440 feet in length and 264 feet in width, with alleys 16 feet wide, and streets running north and south 80 feet wide, and streets running east and west 66 feet in width, divided into lots 44 feet in width and 132 feet in length.

Int. 8. Do you know, and if so state whether or not Rob't Shields ever made any improvements upon the lands described by you

158 by sections; if so, when, and what were the same?

Ans. He made improv'ts on sec. 15 on 10 lots of this survey which I made. It must have been in 1856 that he commenced them. He fenced in those ten lots and built a house after I surveyed it, I think. He might have been building it while I was there; I am not certain about that.

Int. 9. State whether or not his fence enclosing the ten lots cor-

responded with the lines of the streets and lots; and if so, state your means of knowledge in that regard.

Ans. His fence did correspond with the streets and lots, and my means of knowledge are that in consequence of the Indians having removed a large portion of the stakes on that tract I resurveyed it, and my attention was particularly called to that fact.

Cross-examined.

By Redick & Briggs, sol's for certain of the deft's:

Int. 1. What do you know of a co. or association of individuals known at that time (that is, during the years 1855 and 1856) as the "Claim Club?" and if you should answer there was an asso'n so called, then state how many members of the Omaha City Co. belonged to the Claim Club; name them, and state whether or not the object of the "Omaha City Co." was not something more than to lay out an addition to the city of Omaha, and was it not to keep gov't lands from actual settlement by pre-emptors, and to make large speculations out of this pretended paper addition.

(Obj'd to by sol. for comp't as immaterial, irrelivent, and not proper cross-ex'n.)

159 Ans. Common report said there was such an asso'n as the Claim Club. It was reported that Jesse Lowe and T. B. Cuming belonged to that asso'n, and further than those I could not state. I have seen the articles of asso'n of the Omaha City Co., from which I would not infer that any other object was intended than an addition to the city of Omaha. Common report said it was a matter of speculation, and I was inclined to believe it.

Int. 2d. Did that co. ever make any improv't on that add'n? If so, state what it was.

Ans. I don't recollect of any.

Int. 3d. Will you be kind eno. to state, from what you knew of the "Omaha Claim Club," its force and power, whether it would have been safe for any man to have attempted to pre-empt any portion of the sec. you have named during the years 1855, 1856, or 1857.

(Obj'd to by sol. for compl't as immaterial, irrelevant, and not proper cross-ex'n.)

Ans. I don't think it would have been very safe during the years 1855 and 1856; I don't recollect about 1857.

Cross-examined.

By A. J. Popplton, sol. for H. G. & Co.:

Int. 1. State whether the "Omaha City Co.," from whom you say you made this survey, was not composed of men residing outside of this Territory, with the exception of Jesse Lowe and T. B. Cuming.

(Obj'd to by sol. for compl't.)

Ans. I think it was, except I think Mr. Bayliss lived here for a few months.

Int. 2. State whether or not this co. ever made any improv'ts upon these lands other than to plat them into lots, blocks, streets, and alleys, after your survey, and to issue paper certificates repre-
160 senting shares of lots, and put them upon the market for sale, and distribute them among persons whom they supposed to have influence in securing the location of the capital at Omaha.

(Obj'd to by sol. for compl't as immaterial, irrelevant, and not proper cross-examination.)

Ans. I know of none.

Int 3. State whether or not any member of this co. ever actually resided on any portion of these lands, to your knowledge.

Ans. I don't think they did.

LORIN MILLER.

Also, William R. Demarest, produced as a witness for the compl't Aaron Root, being first duly sworn according to law, deposes in answer to interrogatories, as follows:

Int. 1. Are you acquainted with Rob't Shields? If so, how long have you known him?

Ans. I am; I got acquainted with him in the fall of 1856.

Int. 2. State whether or not you ever claimed any interest in the premises pre-empted by s'd Shields. If so, what was the nature of that claim?

(Obj'd to by R. & B. for def'ts on the ground of immateriality and irrelevancy.)

Ans. I had several city lots claimed then for myself and others.

Int. 3. State whether or not the said Shields ever made any agreement with you to deed you those lots. If so, when and what did he say to you in that regard?

(Obj'd to by R. & B. and Poppleton for def'ts, on the ground, 1st, that it does not appear that any of the def'ts were present at the time of the conversation; 2d, * * witness will be guilty of subornation of perjury.)

161 Ans. He did agree to give me deeds for those lots, provided he was successful in pre-empting. I cannot give the day and date; I simply know it was before his pre-emption. He called at my store several times, and urged me to let my matters rest there; that if he got his title he would make mine good. I do not know that they were his exact words, but they were words to that effect.

Int. 4. State whether or not you had any conversation with him on that subject after he had pre-empted. If so, what was said, and who was present?

(Obj'd to; other def'ts not present.)

Ans. After it was publicly known that he had pre-empted he came to me one afternoon to my store in a buggy, with Mr. Test, I think the name was, from Council Bluffs. Mr. Test remained in the buggy and Mr. Shields came into my store. As near as I can recollect, Mr. Shields said: "Demarest, I promised you a title to your lots when I made my pre-emption;" and he asked me if I was ready for it. I

told him I didn't think his title was worth as much as mine was. He never offered me a title, but turned on his heel and took his buggy and drove away.

Cross-ex'd.

By def'ts:

X-int. 1. Do you pretend to say he was anxious and urged you to make that arrangement?

Ans. Yes, sir.

X-int. 2. Did he seem excited when he came to you and worried about it?

Ans. I don't kno. about the worrying part. He seemed about as excited as men generally did in those Claim Club times.

162 X-int. 3. Do you pretend to say that if he had not made that promise, that you and such influences as you c'ld have bro't to bear with the Claim Club or otherwise, w'ld have prevented him from getting his title?

(Obj'd to by compl't.)

Ans. If he had not made the promise I would have employed a lawyer to look after my interest.

X-int. 4. Then I understand you that you did make that agree't with him; i. e., that he sh'd pre-e't the land and then deed you your lots. Am I right?

Ans. I made no such agree't.

X-int. 5. Then am I to understand you that he told you that he w'ld deed the lots if you w'ld let him alone, and he refused to make the agree't with him?

Ans. I refused to make the agree't and refused to let him alone.

Re-ex'd.

By sol. for compl't:

State whether or not you resisted his pre'n when he 1st proved up his right.

(Obj'd to—immaterial and not re-ex'n.)

Ans. I did in all personal conversations with him.

Int. 2. Did you at the time he proved his right in the land office?

Ans. I don't recollect.

(Signed) WM. R. DEMAREST.

Also, George M. Mills, produced as a witness on behalf of the compl't, being by me 1st duly sworn according to law, as hereinafter certified, deposes in answer to interrogatories, as follows:

Int. 1. Are you acquainted with R. S.? If so, how long have you known him?

Ans. I am acquainted with him; I have known him since 1856.

Int. 2. State wether or not you ever had any conversation with him touching his pre-empting the lands in question. If so, when and what was said.

(Obj'd to; def'ts not present.)

163 Ans. I had such a conversation about a month or six weeks before he pre-empted. In s'd conversation he s'd he wanted to buy back his house and he wanted to pre-empt the land. In the conversation he inquired of me whether or not the citizens of Omaha w'ld allow him to pre't. I s'd to him that many of the citizens owned lots in the tract as surveyed by the Ferry Co.; that if he c'ld give them assurance that they c'ld have deeds to their lots I tho't he c'ld pre-e't. He inquired who the owners of lots were. My reply was, I dont' know them all, but such as reside here you had better see. That is all I can recollect of the first conversation. A few days after the 1st conver'n I had another interview with him on the subject of his pre'n, and stated to him that I had lots in the tract, and named other persons who claimed lots in the tract; their names I do not now recollect. Mr. S. replied that he feared the city of Omaha more than anybody else. I s'd to him that if he w'ld take care of my lots in the tract and at some future day ac't to me for them, and give me assurance that he w'ld deal justly by others owning lots in the same tract, I w'ld see what I c'ld do in assisting him to pre-empt the land; and he assured me that he had backers; that Casady and Test, of Council Bluffs, w'ld furnish him all the money he wanted to enable him to pre-empt. After talking the matter all over it was agreed that the first thing to be done was to buy out Beeson, the person to whom he had sold his house and a block of ground. I think he told me
164 then to circulate a petition or recommendation and obtain the signature of the business or influential men of Omaha to consent to or recommend his right to pre-empt. (Obj'd to—contents to written inst't.) To that end he was to go to the Bluffs to get the money to buy out Beeson; and I was to talk to the citizens to learn the feelings, &c. A day or two or thereafterwards I again saw Mr. Shields, who s'd he had been to the Bluffs and made provisions for the money to buy out Beeson, and wished me to go and see Beeson. We went in a buggy to Beeson's house. Then he inquired for B., and was informed that he was down town, naming the point where he c'ld be found. We found him in the north part of O. shingling the roof of a house. Mr. S. went up on the house and closed a bargain with Mr. B. He came down and got into the buggy, and s'd to me, "I am now ready to pre-empt; I want you to get the leading men of Omaha to consent to it." I asked him, "What shall I say to persons owning lots?" His reply was, "Give them assurance that I will do right by them; I will carry out any promise you make." On that I did circulate a paper and obtain signatures recommending or consenting that he might pre-empt the tract. In a few days after I saw him, and he informed me that he had bo't out B. and got the deed, and I gave him the paper containing the signatures w'h I had obtained. Shortly after he pre-empted before the land office, and I called on him for a deed of my lots. He said he w'ld give it to me. I made out a list and gave him of what was mine of lots and blocks. In a few days after that I learned that he had deed. the equally undivid. ½ of his pre-emption to C. and T., of C. B. I called on him
165 soon after, and again applied for my deed. He still s'd he

w'ld make me the deed. I replid to him, "You have deeded the equal undivided ½ to C. and T.; how can you make a deed to me?" He replied that he was authorized by C. and T. to make deeds to me of my lots, and all others he had promised deeds to. I asked him to show me the right. He s'd that he hadn't it, but w'ld go over to C. and T. and get it. He never made me my deed.

X-ex'd.

By def'ts' sol's:

X 1. Are you a party comp't or def't in this suit? And if you sh'd answer you are a def't, are you not afraid, by y'r careful and studied manner of testifying that you will get beat, and are you not anxious to get beat? and if you don't get beat won't you hereafter bring a suit of the same kind *vs.* S. and others?

Ans. I am neither compl't or def't on the record, or, in other words, have not been served with a copy of the proceedings in court. I am not [I am not.] I will use my own judgment on that subject.

X 2. On w'h side of this case have you the greatest interest—to beat or to get beat?

Ans. I have already stated in substance that I am neither compl't nor def't.

X 3. If Mr. R. sh'd maintain his action how much land w'ld you have in that pre'n, provided this suit sh'd settle the title, and if he is beaten how much will you have?

Ans. If R. sh'd win the suit I will have 11 acres, on condition that it sh'd settle the title to the whole pre'n. If R. sh'd lose and the S. pre-e'n be declared good, I sh'd have title, if I under-
166 stand it, to 5½ acres.

X 4. Then are you not interested and anxious to have compl't win this suit and beat you, if it sh'd turn out that you are a def't in this suit; and did you not know that y'r name was in the bill as a def't from Mr. Woolworth and Mr. Root?

Ans. I am not only anxious, but I am interested. Mr. W. and Mr. R. may have informed me that my name was in the bill as a def't, but I have no recollection of it now.

X 5. Do you not volunteer your testimony and come here without subpœna, fee, or reward?

Ans. I do not volunteer. The parties in interest with myself have all been apprised of what my testimony w'ld be. I came here at the request of Jas. M. W. to-day without a subpœna, and without fee or reward.

X 6. Had not you and R. S. a bitter lawsuit in the Dist. C'rt of Doug. co. a short time before he left this country, and is there not a lurking, bitter animosity in y'r mind *v.* him; and have you not stated to different persons in this city that you w'ld "bust" his pre'n if it cost you $10,000, or words to that effect; and did you not so state to Mr. A. Horback, Mr. T. Baldwin, and R. S., and also to Jas. D. T.?

(Obj'd to.)

Ans. We had a lawsuit wherein S. was pl'ff; no more bitter than ordinary lawsuits. The suit was bro't by S. at the request of his att'ys; so I was informed. If judg't was obtained S. was to have credit on some old claim w'h the att'ys had *vs.* him for themselves or others. If S. got beat he was to pay no att'ys' fees. There is no lurking bitter feeling in my mind *vs.* S. I look upon him
167 as a worthless man. I have no recollection of making any such remark as inquired about in last interrogatory. If I said anything it was with reference to the court before w'h the cause w'ld be tried; that if the whole facts came out I did not believe the pre'n c'ld be sustained, and that it w'ld be "bursted." Perhaps I might have used the word "bursted."

X 7. At the time you were manipulating with S., coaxing him to promise you that he w'ld take care of your lots, and, as you say, deal justly by others who had lots in the tract, did you not kno and understand that he, if he carried out what you understood, w'ld commit downright perjury, and you be guilty of subornation of the same; and were you not at one time a practicing att'y?

Ans. 1st, I did not coax S.; 2dly, I did not understand that he w'ld be guilty of perjury, provided that he had pre't the land and paid the claimants for the lots. In all his interviews with me previous to pre-empting, he always spoke highly of the wealth and respectability of C. & T., who were his backers. I have been a practicing lawyer.

X 8. Did you not swear in the ex'n-in-chief that thro' you S. promised, and gave you to understand, that after he pre-empted he w'ld convey to you your lots, and then deal justly by others who had lots in the same tract?

Ans. I don't understand that I swore that he promised to make deeds before pre'n, but w'ld do right by me and persons similarly situated, leaving it optional with him to deed or pay for the lots after pre'n. He promised to deed to me.

X 9. Didn't he promise to deed you your lots and deed
168 other lots in the tract before pre'n, and didn't you accept the promise?

Ans. He promised to do right, to carry out any arrangement I w'ld make with others, and do as I said, if I w'ld assist him to pre-empt.

X 10. Now why don't you answer my question fairly and squarely? Did he not promise to deed you your lots, and thro' you promise to deed other lots in the tract before he pre-empted, and was not that your and his understanding before he entered the land?

Ans. I think I have ans'd y'r questions fairly and squarely. The rest of the last interrogatory has been asked and ans'd before.

X 11. Is that the best ans. you can or will give to that?

Ans. It is as I understand the previous?, and ans'd all the ans. requi'd.

X 12. Will you swear that R. S., while you were manipulating him, agreed to deed you or anybody else a portion of the land about to be pre-empted by him?

Ans. I do swear that R. S. promised to do what was right with me and others similarly interested, by making deeds or [or] paying for the lots; or, in other words, do as I said in carrying out my promise or agree't that I w'ld make for him in aiding him to get his pre'n.

G. M. MILLS.

(Here the def'ts refuse to x-ex. the witness further until the answers the last above ?, and asks the court for a rule upon him requiring him to answer the above ?, when they will proceed with the x-ex., and as in duty bound, &c.)

169 *Evert V. Smith, sworn for compl't.*

1. Where did you live in the summer of 1857?

Ans. I lived at the Douglas House, in this city, in the summer of '57.

2. Were you acquainted with R. S. at that time?

Ans. I was.

3. State whether or not you had any conversation with s'd S. touching his pre-empting the premises in question prior to his proving his right to pre-empt the same at the land office. If so, state when and where such conversation took place, and what was s'd at the time.

(Obj'd.)

Ans. I had such a conversation. It was at the Doug. House, some time in the summer of 1857. Before his pre-'n Mr. S. told me that he was going to—I don't kno. that it matters when it took place in the Doug. House—that he was going into a big speculation, that he was going to buy back some property up here w'h he had sold to B., and a going to pre-empt it. I asked him if he didn't want somebody to go in with him; that I wanted a piece of land near town here, and that I w'ld furnish him some money. He told me that there was some men over the river that was going to furnish him some money. I don't recollect that he stated the names of the parties that was going in with him. That is all I recollect, I believe, of that.

4. Do you kno, and if so, state what improve'ts were upon the land pre-empted by S. in Jan'y, 1858?

Ans. Well, sir, there was one house, about 16 x 24; I guess it was the main part of the building. There was a shanty on back, an addition about 12 feet wide, I think, and about 14 or 16 feet
170 long, I don't know exactly the length, and a board roof, and a fence around the house, and ten lots, enclosing the 10 lots and house; about—let's see—250 y'ds, a little south of west from that building, there was a little small house, about 14 x 16, I guess; or it mi't have been 16 feet square. I don't think there was any fence around that at that time. That constitutes all the improv'ts that I recollect of.

5. Do you kno, and if so, state when S. removed from the lands pre'd by him, and where he removed to?

(Obj.)

Ans. I do not kno the exact time that he removed. He told me before he removed that he was going to remove out to Forest City, I believe was the name of the place, or near there, in Sarpy co.

6. Can you state how long after he sold an undivided ½ of these premises to you he continued to occupy them? If you cannot state exactly, state as near as you are able.

(Obj'd. It don't appear he sold, and immaterial.)

Ans. I can't state exactly; but I think it was in the neighborhood of 2 mo's. I don't recollect the time I moved up.

7. State whether or not you assisted to defend S.'s right to pre't his lands at the time such right was reinvestigated in the land office in this city.

(Obj'd to.)

Ans. Yes, sir; I tried hard for 3 years to sustain his pre'n—about 3 years.

8. State whether or not S. took any part in those proceedings. If he did, what did he do in that behalf?

(Obj'd.)

Ans. He was then at the land office several times. He did not seem to take a great deal of interest in the matter.

9. State whether or not the parties concerned in maintaining his pre'n right at that time experienced any difficulty in obtain-
171 ing testimony of witnesses whom they desired to produce.

(Obj'd to. 1st, immaterial; 2, incompetent; 3d, it tends to show a stringent state of the market on the part of compl'ts.)

Ans. None, to my recollection. They got all the witnesses they wanted.

10. At the time you purchased an undivided ½ of these premises from S., what evidences of title did you take from him?

(Obj'd.)

Ans. I took his warranty deed, and his certificate of pre'n assigned over by him.

11. State where that certificate has been since you rec'd it from S. Shields.

(Obj'd.)

Ans. It has been in my possession ever since, with the exception of 2 years that I was west. When I went away I left it in Mr. Megrath's safe and got it when I came back.

12. State whether or not you ever had any conversation with either of the def'ts interested in the undivided ½ of S. pre'n, conveyed by him to Test, in reference to this certificate. If you ever did, state when and where, and with whom such conversation took place, how the same arose, and what was said.

(Obj'd.)

Ans. I did have such conversation with Mr. S. and Mr. T. I don't recollect the exact time. It was in the spring of 1862, before I went west. It was in Omaha city, I met Mr. S. on the street. He asked me either if I had seen Mr. T., or told me that he was over here, I don't recollect the exact conversation, and told me
172 that Mr. T. told him that he (T.) had got the patent, or was

about to get it. I asked him how he was going to get it when I had the certificate. (Def 'ts obj'd to hearsay.) I met Mr. T. shortly after this conversation, on the street, and told him what Mr. S. had said to me, and told him that I had the certificate in my poss'n, and that I intended to keep it safe.

X-ex'd.

By def'ts:

1. Are you compl't or def't in this suit? If you say def't, are you not anxious to be beat?

Ans. I suppose that I am def't to the bill; that is a? hard to answer. I don't kno that I am overly anxious to be beat, because if the pre'n is sustained under that title I get the undivided ½ of the land—that that I purchased from S., with the improv'ts that have been put on since the sale, which are pretty valuable.

2. What do you get if you sh'd be beat, and Root sh'd maintain this suit, if anything? and if you answer you would get something, state what; and if land, state the No. of acres you w'ld get. Does it fall to you?

Ans. If Root sh'd maintain this suit, and the sale be confirmed, I consider that I sh'd get a good title to the land that I purchased at the sale. I purchased 80 acres at the sale, and I have sold some since. All w'ld fall to me that I have not sold.

3. Then I understand you to say that if you defeat the compl't in this suit you will get 40 acres of land, and if Root defeats you you will get 80 acres?

Ans. No, sir; I don't say any such thing; and you don't understand me to say so.

4. Let this suit be terminated as it may, either for you or *vs.* you, do I understand you to say that you get the same No. acres of
173 land less the No. of acres you have sold?

Ans. The same, with the exception of the 10 lots.

5. What 10 lots?

Ans. The 10 lots that was reserved by S. in his deed to me.

6. Then I understand you to say if you sh'd be defeated in this suit you will make those 10 lots and improve'ts clear, besides getting the same No. of acres of land? Am I right?

Ans. I sh'nt make them clear, because I purchased the land at the public sale.

7. Do you understand me when I ask you the? if you will not make those 10 lots, with improvements, clear; and if you do not, I mean this, that if Root's title is maintained—that is, the public sale—will you not have a title to the 10 lots and imp'ts that you w'ld not have if the S.'s pre'n is maintained?

(Obj'd.)

Ans. I sh'd have a title to the whole 80 under the sale. Those lots, of course, are included in the 80 that I purchased at the sale.

8. If R. sh'd maintain his suit, and the public sale be held good, state whether you w'ld hold your 80 acres divided or undivided, including the lots, and if R. and the public sale sh'd be defeated and

the S. pre'n be maintained good, w'ld you not hold an undivided 80 in 160, without the lots and imp'ts, under your deed from S.?

Ans. Under the sale I w'ld hold an 80 divided. If the S. pre'n is sustained, I w'ld hold an undivided ½ of 160 pre-empted by S., without the lots.

9. W'ld you hold that interest last mentioned free, and divested of all incumbrances; or did you not agree at the time you bo't
174 the land of S. that you w'ld pay certain judg't, or judg't c'ts of his, and among others H. G. & Co., of St. Louis, to the am't of about $1,400; and was not the land attached at the time you bo't it of them, and a subsisting lien thereon, and was not that talked of between you and S. at the time, and are you not now trying to break the S. pre'n that you may divest that interest from that lien, and hold the title under the pretended public sale, free from that lien?

Ans. I sh'd, before this time; if S.'s title had been sustained, so that I c'ld have got a good title to the land, I was to pay the one, I think it was the same one, H. G. & Co.; that I believe is the only claim that I knew of that was on the land at the time. I can't state whether that land was attached or not. Yes, this matter of H. G. & Co. was talked of at the time; I c'ldn't swear now whether it was an attach't, or what it was, on the land. No, sir; I am not. I tried for about 3 years to sustain that pre'n, and w'ld rather have p'd off all the demands that was on the land than to have been to the expense and trouble of trying to sustain the title in S.

10. If the S. pre'n is sustained, and the compl't and public sale defeated, do you not fear that the land and you will be liable for this claim of H. G. & Co., and have you not been so advised?

Ans. I don't kno that I fear it. I don't kno that I have been so advised; but if the S. title had been good, I, of course, w'ld have had to pay that am't.

11. Do you not volunteer your testimony in this case; and have you not appeared here at the instance of compl't, or his sol., without subpœna, fee or reward?

175 Ans. I give my testimony at the request of other parties. Mr. R., I came at his request, without subpœna. I have not got anything yet. I do not kno what I may get.

12. Give the day of the mo, and year, when you rec'd from Mr. S. his certificate of entry, with his assign't thereon; and have you the certif't now; and will you file it with the master, that we may see if the ass't corresponds with your stat't; and do you know who else besides S. had that cert't before you got it?

Ans. To the best of my recollection I rec'd the certif't at the same time I rec'd the deed from S., w'h I believe was the 28th day of Jan'y, 1858. I have the certif't now. I don't kno that I have any objection to filing the certif't, if it is carefully kept. (Here the witness produced the certif't of entry issued to S., which is herewith filed as an exhibit to this testimony, marked "Exhibit A.") No other person ever had the certif't to my knowledge except Shields and myself.

13. Mi't not Test have had it before you got it and you not know it?

Ans. He might have had it after the pre'n, and before I bo't it; but I think not, for Mr. S. told me that he (T.) wanted it but that he did not let him have it.

(The latter part of ans. obj'd to by def'ts.)

14. You stated in your ex'n-in-chief that you tried for 3 y'rs to maintain the pre'n of S. Do you mean that you testified frequently in his behalf during that time trying to show that his pre'n was good? and if you did, state where was the 1st time, and how often, by aff't or otherwise.

176 Ans. I stated that I had tried for about 3 years; I don't know that it was 3 y'rs; I don't recollect the exact time, but I believe it was betwixt 2 and 3 y'rs; I don't recollect that I gave testimony; I mi't once at the land office, but I think not; I c'ldn't state as to time, &c., for I don't recollect that I gave testimony, or made any aff't at the land office.

15. You state that if his pre'n had been sustained, that was all you wanted; and then you was willing to pay these judg'ts, and w'ld have paid them long ago, &c.; now then, why did you not surrender up the certif't when the other parties interested with you in maintaining the S. title told you in the spring of 1862 that they were about obtaining the patent sustaining the title in S., and were obliged to have the certif't in order to get the patent.

Ans. Well, there was no one asked me for the cer't. I knew the pre'n had been cancelled and set aside, and I had the cer't of sale. I didn't think the cer'f't of pre'n was of any ac't.

16. Did you not state in y'r ex'n-in-chief that some of the other parties interested in maintaining the S. pre'n, naming him or them, in the spring of '62 told you they were about maintaining the S title, and were about obtaining the patent, and asked you [and asked you] where the cert'f't was, and you s'd, "I have it, and will be very apt to keep it;" and if you didn't say that, what did they say, and what did you reply?

Ans. I stated in my ex'n-in-chief that I met Mr. T. in the street here, and told him what Mr. S. had told me, and told him that I had the cert'f't and calculated to keep it, or something to that effect; I don't recollect the exact words.

177 17. Did you or did you not state in y'r ex'n-in-chief that at that time T. told you that they were about to maintain the S. pre'n and obtain the patent, when you then told him that you had the c't and w'ld be apt to keep it?

Ans. I don't think that I stated that T. s'd anything about maintaining the title, but I believe I s'd something about the patent, and told him that I had the c't and intended to keep it. Mr. T. didn't have much to say to me about it. I think if it hadn't been for my asking him, that he w'ldn't have said anything ab't it.

18. Did he not say to you at that time that they were about to procure the patent on the S. entry?

Ans. I don't recollect the exact words that he did say. He mi't

have s'd that they were going to try to get the p't, or something to that effect.

19. If he had s'd that they were about to obtain the p't, and asked you where the c't was, you w'ld have remembered it w'ldn't you?

Ans. I don't think he told me they were about to obtain the p't, but that they were going to try to get it.

20. Did not S. tell you in the spring of '62 that they were about to obtain the p't to the land, and was you willing to give up the c't and help procure it at that time, or was you not unwilling to give it up?

Ans. I don't know that he told me that they were about to obtain the p't. He told me that T. had told him that they were going to get the p't, or was going to try to get it, or words to that effect. I was unwilling to give up the c't, for the reason that I had not
178 had any legal notice, or any notice of the [of the] sale being set aside, or any notice that they were trying to sustain the S. pre'n, and I held the c't of sale, and supposed that that was good.

(Def'ts object to witness testifying, he appearing largely interested, and ask the court to rule his testimony out, on ac't of interest.) They then proceed x-ex'ing.)

21. Is there any portion of the land w'h you say you own under this pretended public sale on the record in y'r name?

Ans. I have a deed of it, but I don't think it is on record.

22. From whom do you get your deed that is not recorded?

Ans. From Eldrick Smith.

23. Who did E. S. get it from?

Ans. He got it from me.

24. When did you convey it to him?

Ans. I do not recollect the time that I conveyed it to him now. I can tell by examining some of my papers at home.

25. How much did he give you for it, and how did he pay you, and who was present at the time he made the conveyance? (Obj.)

Ans. I sold it to him to secure some money w'h he let me have. I can't state the am't now that I sold it to him for; I don't recollect. It has been so long that I don't recollect the am't that he was to pay me for it. I c'ld tell by looking at my papers at home. I don't recollect either who was present at the time I made the convey'ce.

26. When was the conv. made, and was E. S. present?

Ans. The conv. was made in this city. I don't recollect whether it was made at the time E. S. was here or not.

27. When was the conv. from him back to you?

Ans. I believe it was made in Peoria, Ill. I have not noticed the papers so long that it has slipped my mind altogether.

179 28. What relation is E. S. to you, and when was he out here?

Ans. He was my father. He was out here the 1st time in '56, and then again in '57, I think it was; I don't recollect the year he was out the 3d time.

29. What was the land worth per acre, &c.?

(Waived.)

30. State what understanding there is, direct or indirect, implied or otherwise, between the def't or def'ts and comp't in this suit, in regard to their paying a pro-rata portion of the expenses of maintaining this suit.

(Obj'd.)

Ans. Well, I don't kno anything about any of the def'ts except myself, whether they have p'd anything, or are going to pay anything or not.

31. Is it not understood between you and the compl't, Mr. R., that in some contingency you are to pay a portion of his expenses in the prosecution of this suit, and have not you and R. talked together on that subject?

Ans. Well, I don't kno that it is understood that I am to pay a portion of his expenses. We have talked something or other about the suit, that is, considerable. I don't kno that I am to pay a portion of this individual suit.

32. In what suit are you to pay a portion of the suit in w'h he is interested? Please explain yourself; I do not understand you; or in what event are you to pay any expenses in connection with him. State fully.

(Obj'd.)

Ans. I do not kno that he is interested in my case at all. I employ an att'y to attend to my case. I am to pay a portion of the expenses in my case. I don't kno whether he is interested or not.

33. Is it not understood between you and R. that if he succeeds in this suit, thereby defeating the S. entry and maintaining the public sale under w'h you claim, that you are to help bear a part of the expenses so also on the other hand if he is defeated?

180

Ans. I have employed an att'y to attend to my case, and if Mr. R.'s case is sustained, and the title under the sale is sustained, and my case sh'd not come to trial and be tried, I w'ld have to pay the att'y the same as if it was tried, I expect.

34. Is that the fairest and best answer you will give to my? whether there is not an understanding between you and the compl't R., that if he maintains his suit and defeats the S. title, that you are to pay a portion of the expenses as att'y's fees or otherwise?

Ans. The only understanding there is betwixt me and R., Mr. R. told me when I came back to town that they had Mr. W. employed in their case, and tho't I had better employ him in mine. I told him I w'ld go and see Mr. W. I did so, and told Mr. W. that I w'ld give Mr. W. so much to attend to my case. I don't recollect whether there was anything said about any other expenses or not.

35. How many cases are you interested in in this suit?

Ans. I can't explain it to the satisfaction of the att'ys.

36. What do you mean when you say "my case," and is not y'r interest identical with the compl't R.'s in maintaining the public sale and defeating the entry of R. S.?

Ans. I mean the case that I have, or will have, in trying to sustain that sale, the same as R.'s, my interest or similar, I suppose, to that R.'s.

37. Who is your counsel defending you in this suit?
I did'nt kno as I had any; I didn't know as this was my suit.
181 38. Did'nt you say that you was def't in this suit?
I did say I was def't in this suit, but I have no counsel employ'd.

39. Have you the deed from E. S. to you in your poss'n, and if so, will you show it to the master to-morrow that he may take a copy of the date thereof?

I have it, but I don't know if it is here or with my papers in Peoria, Ill. I will look, and if it is here I will produce it.

40. How many aff'ts have you made to sustain the S. pre'n, if any, and how many to defeat it, if any.

(Obj'd.)

Well, sir, I don't recollect now that I have made any to sustain it, or any to defeat it.

Re-examined.

By sol. for compl't:

1. I will state to you the different branches of this case, that you may state your connection with them understandingly. The original bill filed by R. relates to about 20 acres of land claimed by him by virtue of a title derived from public sale of the whole 160 acres. H. G. & Co. filed in the same case a x-bill, claiming title to the undivided ½ of the 160 conveyed by S. to you, alleging that they acquired title thereto by virtue of an ex'n sale *v.* S. I wish you now to state if you have any agree't or understanding with R. that you are to pay a part of the expenses that may be carried in the prosecution of his original bill?

(Obj'd to. See record.)

Ans. No, sir; I have no contract or agree't with Mr. R. to pay anything in relation to his bill.

2. You stated in your x-ex'n that if the pre'n title was sustained you w'ld be entitled to an undivided ½ of the improv'ts made on the whole 160, except the 2 lots; now state the value of the
182 undivided ½ of those improv'ts wh w'ld fall to you.

(Obj'd to, because the examination not truly stated.)

Ans. I sh'd think the undivided ½ of those improv'ts w'ld be worth I sh'd judge from 12 to $1,500. I dont kno exactly what the improv'ts cost.

3. State whether or not you had a conversation with any of the parties interested in the undivided ½ of the pre'n, conveyed by S. to T., touching the effect of the appoint't of Caleb B. Smith as Sec'y of Int. of the U. S., upon the decision of the land dep't upon the validity of the S. pre'n. If so, when, where, with whom, and what was said?

(Obj'd.)

Ans. I had a conversation over at the Bluffs with Baldwin or Dodge, (I don't recollect wh it was,) at their office. It was at the time or during the time that this pre'n was being tried at the land office. They told me that it was reported that Mr. Thompson was about to

resign, and that a man by the name of Smith, Caleb B. S. or Caleb S., was to be appointed in his place, and he wished that they w'ldn't make any decision in the case until S. was appointed, and they c'ld get the thing fixed. He tho't to suit them, as I think he told me that S. was some connection of his, or his w'f's, or some person interested in the case. That is all the conv'n I recollect of having with them.

4. If the pre'n be sustained, what will be y'r interest in the lands claimed by R. and in ? in the original bill?

I suppose it would be the equal undivided half.

5. If the pre'n be held invalid, and the title acquired at the public sale be held good, what interest will you have in the lands claimed by R., and in ? in the original bill filed by him?

Ans. Not any.

183 *Re-examined.*

1. Which ½ of the 160 will you get, provided R. and you shall maintain the public sale good, and defeat the S. entry?

Ans. If the sale remains good, I shall get the south 80 of the ¼ sec.

2. Are the 10 lots and imp'ts on that 80 that you w'ld get?

The ten lots that were reserved in the deed from S. to me and the imp'r'ts are on the south 80.

3. Does not the south 80 lie nearer the city of O. than the north 80, and is not a large portion of it cultivated and fenced, and does it not lay on the main traveled road from this city to Florence?

The south 80 does lie nearer the city than the north 80. The n. 80 belts right on the S. 80, and forms an L. I fenced and brok up the whole 80 that I bo't at the sale. There are 2 roads running from the city to Florence. One road runs along the east end of the S. 80, the other road runs along the west end of this 80, and the whole length of the n. 80.

4. Which 80 is worth the most money at this time to you, in your opinion, leaving out the estimate the buildings, and what is the difference in value?

Ans. Well, sir, I sh'dn't consider that to me there is a great deal of difference. The n. 80 is the best piece of land for farming purposes. There is no waste land on it. I am not able to judge the difference in value. It w'ld be owing a good deal to what a man wanted it for.

5. Has not land adjoining the s. 80, and above it, been cut up and sold for business purposes the past year?

Yes, sir; land n. of that 80, and e. of the other 80, has been
184 cut up into 2 and 5 acre lots, and sold for building purposes within the last year.

6. At what rate did that land adjoining the S. 80 sell per acre, as you understand it from your own knowledge and hearsay?

(Obj'd.)

I don't kno anything about it from my own knowledge, only from hearsay. I heard that it sold for $200 p'r acre.

7. The improv'ts you spoke of as falling to you in case you and R. failed to make good this pretended sale, and you were compelled to

fall back and stand up to the S. title, as you did for 3 long years before, you mean the undivided ½ of the improv'ts put upon the tract by y'r friend Root, do you?

Ans. These are the improv'ts that I spoke of.

8. Now, Mr. S., will you swear that if Root was defeated in this suit you w'ld be hard hearted eno. to take from him the undivided ½ of the improv'ts put there by him under some color of title?

I can't swear what I w'ld do; the Lord only kno's what I w'ld do.

E. V. SMITH.

Also, Andrew J. Poppleton, produced as a witness on the part of complainant, being by me first duly sworn, as hereinafter certified, deposes in answer to interrogatories as follows:

Int. 1st. Are you acquainted with the handwriting of James C. Mitchell, and have you seen him sign his name?

Ans. I am, and have seen him sign his name.

Int. 2d. Look upon the paper now shown to you, and state if in your opinion and from your knowledge of the handwriting of said Mitchell, his two signatures thereon written are genuine.

(Objected to as immeterial.)

Ans. I should think they were.

(The sol. for complainant Root here offers the said paper in evidence, and requests the examiner to attach the same to the testimony taken in the case, to the introduction of which sol'r's for def't's object, 1st, for the reason that the paper shows upon its face an alteration of the figure (2) to a figure (1) in giving the number of the block, and that it does not appear that such alteration was made before sining by said Mitchell. 2d. That the date of the deed shows that at that time no land or lots could be conveyed by any one, the title being then held or controlled by the Indians, their title not having been then extinguished and that no government surveys had then been made in this Territory.)

185 Int. 3d. Are you acquainted with the handwriting of J. M. Palmer, and have you seen him write his name?

Ans. I am and have.

Int. 4th. Look upon the paper now shown to you and state from your knowledge of his handwriting if you believe his signature thereto is genuine.

(Objected to by sol's for def'ts as immaterial.)

Ans. I should think it was.

The sol. for complainant Root here offers said paper in evidence and asks the examiner to attach the same to the testimony in this case, to the introduction of which sol's for def'ts object, for the reason: 1st. That the same purports to be a deed from some company, without saying what; has no acknowledgement. 2. That on its face it shows no title in any one which could be conveyed, all lands here being at that time held and controlled by the Indians; and further that there were no government surveys whatever at that time in this Territory this far north.)

A. J. POPPLETON.

The two papers above referred to are attached to this testimony, marked respectively Exhibits "B" and "C."

Byron Reed sworn for compl't:

1. Look upon the book now shown to you and state if you know what book it is.

(Obj'd to, see record.)

(Objected to as immaterial, irrelevant and incompetent, it appearing from the date of that book and the proceedings therein referred to, relative to the forming of the "Omaha City Co." and the dividing of certain lands into lots, that they were all had before any government survey was made of such lands, and under no act of Congress or law of the United States, and therefore void, neither claiming it as a town site by any act of Congress, nor by pre-emption under the act of 1841; and lastly, because it has been in proof by complainant's own testimony that the said Omaha City Co. never made any improvement whatever upon this tract or any portion of it, but that it was a rotten company, gotten up for speculation only, and to preclude said lands from being actually settled upon under the laws of the United States.)

Ans. It is the record book of the Omaha City Co.

2. State whether or not the said record book shows to whom certificate No. 416 was issued, if it does refer to the entry thereof.

Obj'd to, same objections as before.)

It does; I find the entry of it on the book.

3. Read that entry.

(Obj'd, same objection as above.)

"Certificate No. 416, to R. Shields."

4. For what purpose is the column formed in which is entered the name "R. Shields?"

(Obj'd, same objections.)

To enter the names of parties to whom certif'ts were issued.

5. Do the records of said co. show what lots were drawn by certificate 416.

(Obj., same as before.)

Ans. They do.

6. Refer to such record and read the entry made in that behalf.

I find the entry as follows: "Certificate 416, R. Shields, lots 6, 7, 8, 9, 10; block 46½, lots 1, 2, 3; block 22½, lots 1, 2; block 58½, lots 6, 7, 8, 9, 10; block 128½, lots 1, 2, 3; block 59½, lots 2, 3; block 187½."

BYRON REED.

Compl't introduces in evidence 1st page of the book, and so much of the other portions as shows the other entries under objections of def'ts, and same are marked D, E, and F.

John C. Johnson, sworn for compl't:

Int. 1. Where did you live in the summer of 1856, and thence for two years thereafter.

186 Ans. Well, it was on the Smith tract.

Int. 2. Are you acquainted with the lands pre-empted by R. S? If so, how far is the tract described by you as the Smith tract from said lands pre-empted by S.?

Ans. I am acquainted with the lands pre-empted by R. S. The Smith tract adjoins the land pre-empted by S.

Int. 3. At what date did you go to live on the Smith tract?

Ans. On or about the 23d of Aug., 1856.

Int. 4. Who lived in the house on the S. tract at that time?

Ans. John Beeson.

Int. 5. How long did he continue to live there?

Ans. Well, sir; I can't be positive about that, I think until the month of Sept., 1857. I can't swear as to the day.

Int. 6. Did R. S. live on the land after that? If so, when did he go there to live?

Ans. He did; I think it was in Oct., '57, he went there.

Int. 7. State whether or not he bro't his family there when he first removed to the tract; if he did not, when did they come there to live?

Ans. He did not. I can't state whether it was in Nov. or Dec. I think it was in Nov., '57.

Int. 8. How long did S. live there?

Ans. I cannot say. He was living there at the time I went away.

Int. 9. Do you know, if so, state where he removed to from s'd lands?

Ans. I do not know.

Int. 10. State if you know what improv'ts S. made upon the tract after he removed there with the view of pre-emt'g the land.

Ans. Well, sir; he built a small addition to the house; I can't say the size.

Int. 11. Describe the addition.

(Objected to on the ground that the witness has already stated that he did not know the size of it.)

187 It was built with cotton wood boards running up and down, and a board roof on it, I think; I w'ldn't be positive about the boards running up and down on either.

12. State whether or not the house was lathed and plastered, or sealed on the inside from the time he built it to 1st Jan'y fol'g.

I don't know.

13. State whether or not the s'd S. ever stated to you where he intended to remove to when he left s'd tract. If he did, what did he say to you on that subject?

(Objected to by sol's for def't. 1st. That it is immaterial. 2d. That it does not appear that any one of the defendants were present and knew anything of the conversation, and therefore it cannot affect them. 3d. That it is leading.)

Well, he said he designed after moving up on that to remove out on to a piece of land; he had hired a man to pre't on the Elk Horn, near Forest City.

14. State whether or not you ever had any conversation with s'd S. about his object in pre't'g the 1st mentioned tract; if so, when

and where did that conv'n take place, and what did he say on that subject?

(Objected to by sol's for def'ts on the ground, 1st. That loose statements and conversations with Robert Shields about this matter are wholly immaterial, and 2d, that it does not appear that any of the other defendants were present and had any knowledge of said conversation, and cannot be affected by it.)

I did have such a conv'n with said S. It was about the time he first commenced to build the addition; I think the day before; it was about ½ the distance between the S. house and where I lived at that time; he s'd he wanted that I sh'd help him build the add'n, that he had got a nice thing on proving up, and tho't that he c'ld make about $15,000. I might have worded it in a little different manner. He s'd that he had the thing cut and dried; that "parties over the river," was the words he used, was agoing to furnish money for him to pre't. That is all at the present time that I think of.

15. State whether or not the s'd S. told you he expected
188 to get or had got the money with w'h to buy back the Beson property. If so, what did he state to you on that subj't?

(Objected to by soli's for def'ts on the ground that it does not appear that any of the other defendants were present and knew anything of this conversation, and therefore immeterial.

2. That it seeks to lead the witness, he having first stated that he gave all the conversation which he can distinctly remember at this time.)

Well, I did. I gave in the other? all I remember at this time.

16. State whether or not at any other time he, S., stated to you where he expected to get or had got the money with w'h to buy back the B. property; if so, what did he say to you on that subj't.

(Same as before.)

Well, sir, I have no recollection of his stating, at any other time, anything about the money to buy s'd property.

17. State whether or not there was any other house on the S. tract at the time he went there to live. If there was, was it inhabited; and if so, state if you kno the name of the men who lived in it.

There was another house on the tract. It was inhabited by a Mr. Sweeney.

18. State whether or not s'd S. ever stated to you when he expected to get the money to buy the Sweeney improv't; if he did, what did he say to you on that subject.

(Obj'd.)

He s'd he expected to get the money from parties living in Council Bluffs; that he tho't by buying the property he c'ld get Mr. Sweeney off the land; that he feared s'd Sweeney might cause him trouble in proving up.

19. State whether not s'd S. ever stated to you before proving up that parties in C. Bluffs were interested with him in pre't these lands; if so, what did he say on that subject.

(Objected to by sol's for def'ts on the ground, 1st, that it does not appear that any of the other defendants were present and knew any-

thing of this conversation, and it is therefore immaterial as to them. 2d. It seeks to lead the witness to a statement which he refused to make, and is leading.)

Well, sir, I think the 1st ans. I gave will ans. this ?. He never told that they were interested just in those words.

20. Did he ever say anything to you relative to that subject? State what he said.

(Objected to by sols for def'ts on the grounds, 1st, that it does not appear that any of the other defendants were present and knew of this conversation, and is therefore immaterial as to them.

2d. That the witness has fairly stated thrice, or three times, that his answer to the first question was about the language of Shields on that subject and ought not to be badgered by the party calling him.)

Well, I don't know that I can, without repeating what I have said.

189 21. Then, do I understand you to say that S. did not inform you or give you to understand that some parties at C. B. were interested with him in pre't'g these lands, or were to get some part of the lands from him when he had proved up? Please explain fully.

(Objected to by solicitor for def'ts on the ground, 1st, that it does not appear that any of the other defendants were present and knew anything of the conversation, and it is therefore immaterial as to them.

2d. That the witness has already stated in his first answer all his conversation with Shields on that subject which he can now recollect, and can only answer this question as he has the last, to be consistent with what he said; and

3d. That it was leading—putting the words in the witnesse's mouth that he may again put it forth upon paper, when he has already stated that he did not tell him that parties over the river were interested with him in that pre-emption.)

Well, he gave me to understand that he designed to make the $15,000 out of the act of proving up, but in what shape he intended to make it he didn't tell me.

X-ex'd.

1. Have you been talking with the compl't R. as to what you w'ld swear to in this case; and if so, how often have you talked to him, and how lately, and is he not to pay you for your time while engaged in testifying?

I talked to the compl't some this morn'g, and gave him no satisfaction to my knowledge what I sh'd state. He did not ask me any ?s on the subject that I recollect of. There is no such contr. that he is to pay me for my time.

2. Did his counsel take to you this morn'g, or at any other time, as to what you w'ld testify to?

Ans. He did.

3. How often?

Ans. Twice.

4. The Smith tract alluded to in your ex'n-in-chief--do you not kno that Smith was driven from it and his house burned by what was known as the Omaha Claim Club? If so, state when it was, as you understand it.

I do not, only as hearsay. I was not living in the Terr'y at that time. I understood from Mr. Smith, in the spring of 1858, he was forced off by a band of armed men, called the Omaha Claim Club, and his shanty burned.

5. Question waived.

(Signed) J. C. JOHNSON.

190 John H. Sahler sworn for compl't:

1. Are you acquainted with R. S.; if so how long have you known him?

I am acquainted with him; have known him between eight and nine years.

2. Where did s'd S. live when you first became acquainted with him?

I cannot state positively. My impressions are he lived on Farnham st. now in Omaha.

3. How long did he continue to reside there?

Until early in the spring of 1857.

4. Where did he live next after that?

After breaking up there his family went east—to Penn'a. He made it his home out at Forest City, in Sarpy co.

5. Do you kno, and if so state, when he removed to the lands pre'd by him?

My recollections are it was in October, 1857.

6. State whether or not his family were with him when he first began to live on the tract in 1857.

I cannot state positively. I rather think not.

7. How long did he continue to reside on the tract?

I cannot state. I do not recollect. I think but a short time.

8. Where did he remove to when he left s'd tract?

My recollection is to Sarpy co., near Forest City.

9. What business was he engaged in, and where did he carry the same on in the fall of 1856 and winter of 1856-'7?

He carried on merchandising in the city of O. till during the winter of 1857. After the 1st of Jan. 1857, he sold out to F. W. Brown.

10. Are you acquainted with Jefferson P. Casady and James D. Test; if so, how long have you known them?

191 I am acquainted with them. Have known them personally for about 7 y'rs, and by reputation near 9 y'rs.

11. Where did they live during the years 1857 and 1858, and in what business were they engaged, and where did they carry on the same?

They lived in C. B., Iowa. They were practicing law and land agents and bankers, and they carried on bus'n in C. B., Iowa.

12. Do you kno, and if so state, whether s'd S. had any business connection with s'd C. and T. during the years 1856–'7, and '8? If they did, state what the same was.

(Objected by soli's for def'ts on the ground, 1st, that if the witness shall state that he knows anything about the matter inquired of through statements of Shields, it is immaterial as to the defendants, who were not present at the time such statements were made.)

S. informed me some time prior to selling out to Brown that he kept a b'nk ac't with C. and T.; that is all, I believe.

X-ex'd.

By sol's for def't:

1. How many lots, or how much interest have you in the tract in dispute?

I do not recollect of ever having, nor do I now, have any interest in the tract.

2. Has y'r bro., w'f, or father any interest in the tract, or had they, or either of them any interest at any time?

I don't recollect of any interest that they ever had at any time. Now they have none whatever.

3. Were you not S.'s lawyer at one time, and his intimate and bosom friend?

I never was his lawyer, to the best of my recollection, and never intimate with him.

4. Had you not an altercation or lawsuit with C. and T., or both, at one time, and are you not bitter towards them at this time?

192 The firm of w'h I am a member had a law suit with C. and T. at one time, but we have always been, personally, friendly, so far as I know.

5. Do you not volunteer your testimony in this case, and come to give it without subpœna, fee, or reward?

I came at the request of Mr. W.; I was not subpœnaed; I don't kno of any fee or reward.

(Signed) JOHN H. SAHLER.

Gilbert C. Monell sworn for compl't:

1. State whether or not, prior to R. S. proving up his pre'n certain lands to the north of this city, you took any steps to prevent his doing so; if you did, state what you did in that behalf.

(Obj'd as immaterial.)

(Objected to by sol's for defendants on the ground that anything the witness may have done or said in or about the Shields pre-emption is wholly immaterial as to all the defendants, except those cognizant thereof.)

I entered a written objection in the land office against his proving up.

2. State whether or not you were here when he proved up.

I was not.

3. State whether or not, after you returned, you had any conver-

sation with the register of the land office relative to his permitting S. to make a pre'n; if you did state when and where that conver'n took place and what was s'd.

(Obj' to, hearsay. Def't's not pres't, and tends to show a stringent state of the market for testimony for compl't.)

I had a conv'n immediately on my return or shortly after. He s'd that he had waived my obj'n on the promise of S. to grant deeds to the property in w'h I was interested.

4. Explain more fully to whom S. was to make the deeds.

(Obj'd.)

(Objected to by sol's for def't's on the ground, 1st, that it calls for hearsay testimony; 2d, it does not appear that any of the defendants were present or knew anything of this protest or conversation.)

To me and the parties whom I repres't as agent.

5. State whether or not any proceedings were ever had in the local land office for the district in which such lands are situate
193 touching this pre'n. after the reinvestigation of S.'s pre'n right in the spring of 1858, excepting only the public sale in July, 1860.

(Obj.)

(Objected to by sol's for def'ts on the ground, 1st, that it is not the best evidence; 2d, that it is leading; 3d, that it is immaterial.)

I don't kno of any.

6. State whether or not you ever had any notice from the land dep't or any of its branches, or from any of the parties claiming title to the land under S.'s pre'n, of the purpose of Sec'y Smith, of the Int. Dep't, taking up the case of S.'s pre'n for re-ex'n?

(Obj'd.)

(Objected to by sol'rs for def'ts, on the ground, 1st, that it is immaterial whether witness was notified specially or not; 2d, because he, witness, knew, if he knew anything, that the re-examination would be upon the same testimony and written documents and evidence passed upon by his predecessor, the rebel Thompson, and that no new testimony could be then offered in the case, and it is therefore wholly immaterial.)

I had not.

7. State when and how you first learned of this purpose to do so.

(Obj'd to as immaterial.)

I think it was more than a year after the sale. I heard it thro' a private source.

State what steps if any you took to inform yourself of what was being done in the matter by the land dep't.

(Obj'd to as immaterial and irrelevant.)

I wrote to Mr. Hitchcock, at Washington, to call at the Land Dep't and ascertain the facts.

9. State whether or not you rec'd from Mr. H. any inform'n about the action of the Land Dep't; if so, what was it?

(Obj'd to by sol'rs for def'ts as hearsay, immaterial, and shows a dearth in the testimony of complainant.)

Mr. H. sent me a copy of a letter from the Sec'y of Int. to the

Com'r of the Land Office requesting him to delay the issuing of the patent to me for the present—(Here deft's obj't to contents of writing)—but was told by the Com'r of the Land Office that the delay wl'd probably be short, as there was no legal obj'n yet presented to him.

10. State when next you learned that the Sec'y had acted or was about to act upon the matter, and what you learned on that subject.

(Obj'd to by sol's for def't as immaterial, and calls for hearsay testimony.)

Some months after I learned that the Sec'y had vacated the
194 sale to me and ordered a patent to be issued to Shields.

11. State whether or not you thereupon took any steps to secure a hearing upon the matter; if you say you took any, state what you did in that behalf.

(Obj'd.)

(Objected to by sol's for def't as immaterial to the defendants what he did, he having stated and shown by his own testimony that he did not avail himself defence to defeat at the pre-emption at the local land office in the first instance.)

I applied to the Sec'y of Int. and Com'r of the Land Office for a hearing, as a purchaser at the public sale.

12. State whether or not you succeeded in obtaining a hearing at the hands of the Sec'y.

(Obj.)

Ans. I did not.

13. State if you kno if the other parties who held interests under the public sale were heard by the Sec'y in opposition to the pre'n right of Shields.

(Obj'd by sol's for def'ts on the ground that witness don't know it all yet.)

Mr. Smith, the other party, told me that he had not.

14. Do you kno anything of the rest?

(Obj. to on the ground that it is hearsay testimony.)

Ans. I do not.

Cross-examined.

1. Are you compl't or def't in this suit; and if you sh'd answer def't are you not afraid, by the careful and studied manner of your testifying, that you will get beat; and are you not anxious to be beat by the compl't?

I am neither compl't nor def't, not that I kno' of.

2. Don't you kno' that you figure somewhere in this bill of compl't either as compl't or def't, and have you not so learned from the [the] counsel for compl't, Mr. W.?

I have no knowledge of being a party in the case, and have not so learned.

3. If it sh'd turn out by an ex'n of the bill that you are a def't in the suit, are you not deeply interested in being defeated by the compl't Root?

I am not pecuniarily interested either one way or the other in the termination of this suit.

195 4. Then, sir, I understand you to say and mean that you have no interest in the result of this controversy, but stand here as a purely disinterested witness; am I right?

Yes, sir; you are right.

5. Are you interested either directly or indirectly in the result of this suit?

Ans. I am not.

6. Did you not sell by warrenty deed, and to certain parties in the east, lots in the S. pre'n before he entered it?

My deeds were all quit claims, so far as I know.

7. Have you not sold since that time portions of the land covering the same lots or some of them to other parties covenanting *v* y'r own acts?

To the best of my recollection the deeds were all executed at or near the same time and in the same form, and what remained undeeded was deeded to parties under the direction of the city of O., and none of the deeds, to my knowledge, held me responsible for the title. I c'ldn't swear to the contents of the deeds. I guarded against a warranty.

8. Did you not convey by deed, covenanting against your own acts, (a deed that you have made in this town, perhaps fifty times, called a special warranty,) covering a portion of the same lots before sold by you and deeded as you say by quit claims?

I reply, as I did before, that I have no recollection of executing but one form of deed, or but one deed to the same lot.

9. You spoke in y'r ex'n-in-chief of your protesting *vs.* S. pre-empting the land because you held lots in the tract. What did you ever do with those lots; and about how many had you?

196 I do not remember how many I had. I sold them after S.'s entry had been vacated. I had about 20; there may have been 15, and may have been 30.

10. About how long before the public sale did you see them?

I don't kno'. I sold them as soon as it was known the property was in the gov't; some of them were sold before the question was raised at all, before S. filed.

11. How much interest had you in the tract at the time of this pretended public sale?

Ans. I do not know of any pretended public sale.

(When the witness gets thro' answering the question the sol. for def'ts will proceed with the ex'n.)

12. What interest had you in this tract bid off by you at a public sale (so called) but w'h is contended on the part of def'ts to have been fraudulent and void?

I may have owned a few lots at the time, or I may not.

13. What is your best recollection on that subject?

My best recollection is that a few stood in my name at the time of the sale w'h I had sold but had not deeded.

14. Have you deeded them since; if so, to whom?

They were all included in the deeds that I gave soon after the sale.

15. Whose money bo't the land at the sale?

The city of Omaha's.

16. What do you kno', and was there not an arrangement between certain parties and the city of O. that at that sale the city sh'd be protected in buying in one part of this tract and E. V. Smith the other? State what was done in that regard and tell all you

197 know about it.

(Obj'd to by compl't "as not proper cross-examination, immaterial and irrelevant.")

Ans. I know of no agreement that either should be protected; there was an agreement by w'h Mr. Smith selected one eighty and the city of O. the other.

17. Between whom was that agree't made, and was this the same sale at w'h Horback's land was bid off?

The agree't was between Smith and a com'ee of the common council. I do not kno' whether it was the same sale with Horback's or not. I do not remember.

18. You are sure then that nothing was s'd or understood between these parties that either sh'd be protected in their bidding?

Nothing was said, and I am quite sure nothing was understood, certainly not on my part as one of the com'ee.

19. Was a record kept of all you did so relating thereto in the city council?

I do not now recollect what was recorded.

20. Did you not convey the land now claimed by the compl't R. to him by deed of special warranty, and did he not buy it on your representations that the title was all right; and did he not rely upon your representations in making the purchase, and was you not the means of getting him into this snap, and ain't you anxious to get him out?

The land referred to was sold at public auction by the city of O. in my absence; on my return I executed a deed or deeds to all lands so sold as directed by the city, in the same manner as the pre-

198 vious deeds had been executed, guarding *vs.* any personal liability. I do not remember that I ever had any com'n with Mr. R. on the subject; previous to the sale I s'd to several, and may have said to him, that I believe the sale to be valid and the title good, but made no warranty whatever to my knowledge. I was not the means of getting him into this "snap" any further than as already mentioned. I am only anxious to get him out of it inasmuch as I believe he bo't it in good faith and has a right to the land.

21. How did you come to tell him that you believed the title was good; and was it not after you made the deed, or was it before, that you so told him?

(Obj'd to by sol's for compl't, because the witness has not stated that he so told Root.)

I have no recollection of any conversation with Mr. R., on the subject, at or about that time.

22. Who was the att'y for the city of O. at Washington, if she ever had one?

I think it was Thompson.

23. About when was he first employed for the city of O.?

(Objected to as not proper cross-examination.)

I don't know.

24. About when, and was he not employed to defend *vs.* the pre'n of Noble R. Hays to a small tract on the river, in this city?

(Obj'd by sol. for compl't as not proper cross-examination, immaterial, and irrelevant.)

I think he was employed to attend to all the business the city of O. had in Washington, generally. I found him in the employ of the city when I was in the city council, in 1860, and left him so; and I know nothing of the date of his employment otherwise. I don't kno' that he has ever been discharged by the city.

25. Then may he not have had notice of and defended *vs.* the S. pre'n, and you not have known it?

I think not.

26. Question waived.

G. C. MONELL.

199 THE TERRITORY OF NEBRASKA, *Douglas County, ss:*

I, George W. Doane, a special master in chancery, duly appointed to take the testimony and proofs in the foregoing cause, do certify that the said Lorin Miller, William R. Demarest, George M. Mills, Evert V. Smith, Andrew J. Poppleton, Byron Reed, John C. Johnson, John H. Sahler, and Gilbert C. Monell, above named, were first duly sworn to testify the truth, the whole truth, and nothing but the truth, in answer to such questions as should be propounded to them and each of them, upon their examination; that the foregoing depositions, by them respectively subscribed, were reduced to writing by me, and written in the presence of said witnesses respectively, and by said witness respectively subscribed in my presence, at the time of taking the same, and in the presence of the said solicitors of the said parties in attendance, and were taken by the consent and in the of the solicitors of the respective parties, complainant and defendant, at my office, in the city of Omaha, in said county, beginning the 16th day of May, A. D. 1865, and continuing, by adjournment from day to day, until the same were completed.

Witness my hand this 30th day of May, A. D. 1865.

GEORGE W. DOANE,
Special Master in Chancery.

200 *Exhibit "A."*

No. 996. RECEIVER'S OFFICE,
At Omaha City, Nov. 21st, 1857.

Received from Robert Shields, of Douglas county, Nebraska, the sum of two hundred dollars and cents, in full for W. ½ of the SW. ¼ sec. 10, and N. ½ of NW. quarter of section No. 15, in township No. 15 N. of range No. 13 E., containing one hundred and sixty acres and one hundredths, at $1 $\frac{25}{100}$ per acre.

$200 $\frac{00}{100}$.

ADDISON R. GILMORE, *Receiver.*

Endorsed: R. Shields.

Exhibit "B."

In consideration of the sum of thirty-two dollars to me paid, the receipt whereof is hereby acknowledged, I hereby quit claim to Robert Shields, of Omaha city, the following described property situated in the county of Douglas, Territory of Nebraska, being lots No. 2, in block No. 145, in Omaha city, as surveyed by A. D. Jones, and lithographed by the Council Bluffs and Nebraska Terr'y Company; also lots 11, 12, 13, 14, and 15, in block No. 128½, in the Omaha City Company's addition to Omaha city.

Witness my hand and seal this fifteenth day of October, A. D. 1855.

[SEAL.] JAMES C. MITCHELL.

201 TERRITORY OF NEBRASKA, *County of Douglas, ss*:

On this 15th day of October, A. D. 1855, before me, a notary public in and for said county, personally appeared the above-named James C. Mitchell, known to me to be the identical person whose name is fixed to the above instrument as grantor, and acknowledged the same to be his voluntary act and deed.

[SEAL.] A. J. POPPLETON,
Notary Public Douglas County, N. T.

Figure two in number of block mentioned in foregoing deed altered by me to one, the two being an error.

JAMES C. MITCHELL.

Received for record April 3d, 1856, at 2 p. m., and recorded in book B, page 225.

THOMAS O'CONNOR, *Reg.*

Exhibit "C."

For a valuable consideration, the receipt of which is hereby acknowledged, the Omaha City Company do hereby quit claim, grant, sell, convey, and confirm unto R. Shields, of Omaha city, Nebraska Territory, and to his heirs and assigns forever, the following-
202 named lots in Omaha city, (being a portion of the lots distributed September 4th, 1855, and first lithographed in the new map issued August, 1855:)

Lots Nos. 6, 7, 8, 9, and 10, in block No. 46½.
Lots Nos. 1, 2, and 3, in block No. 22½.
Lots Nos. 1 and 2, in block No. 58½.
Lots Nos. 6, 7, 8, 9, and 10, in block No. 128½.
Lots Nos. 1, 2, and 3, in block No. 59½.
Lots Nos. 2 and 3, in block No. 189½.

To have and to hold the foregoing described premises unto the said R. Shields, and his heirs and assigns, forever.

In witness whereof I have hereunto set my hand and seal this sixteenth day of October, A. D. 1855.

[SEAL.] J. M. PALMER,
Pres't of Co.

Signed, sealed, and delivered in presence of—
GEORGE ARMSTRONG.

TERRITORY OF NEBRASKA, *Douglas County*, *ss*:

Personally appeared before me, Andrew J. Poppleton, the undersigned, an acting notary public in and for said county, J. M. Palmer, to me personally known to be the person described in, and
203 who executed, the foregoing instrument of writing, and acknowledged the same to be free and voluntary act and deed, for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal this day of , A. D. 185 .

I certify that Andrew J. Poppleton whose name is appended to the foregoing acknowledgment, is now, and was at the time of taking the same, an acting notary public in and for said county, duly authorized to take acknowledgments of deeds.

Received for record, June 24, 1856, at 9 o'clock a. m., and recorded in book B, page 115.

THOS. O'CONNOR, *Reg'r.*

Exhibit "D."—Extract.

"The undersigned have this day associated themselves as a joint stock company under the name and style of the Omaha City Company, for the purpose of co-operating with the Council Bluffs and Nebraska Ferry Company in building up Omaha city.

"Said company having purchased claims joining Omaha city the area of which is one thousand four hundred and sixty-nine acres more or less; our respective interest shall be the amount of capital stock paid by each in the purchase of said claims, and shall be shown and
204 represented by certificates of stock signed by the president and treasurer of said company, and the seals of the company affixed thereto. Said company shall have a seal, and all papers issued in its name must be authenticated by said seal. The officers of said company shall consist of a president, secretary, and treasurer, and they shall be directors of the company to conduct its business. Six hundred certificates of stock shall be issued, each representing an undivided interest of twenty lots, one hundred of which certificates shall be held by the treasurer, to be disposed of as may be ordered by the directors, and the balance of said certificates shall be distributed to the members of the company in proportion to the amount of capital stock paid by each. James M. Lore shall be pre-

sident, Jesse Lore secretary, and Samuel S. Bayliss treasurer, until other officers are chosen.

"Dec. 23d, 1854.

"J. M. LORE & CO.
"SAMUEL S. BAYLISS.
"E. & J. LORE.
"TOOTLE & JACKSON.
"J. M. PALMER."

I hereby certify that the within extract appearing on the [on the] other page of this half sheet was truly copied by me from the record book of the Omaha City Company, as exhibited in evidence by the witness, Byron Reed, and is a copy in full of the first page of said record book, and is annexed hereto as exhibit "D" at the request of solicitor for complainant.

GEORGE W. DOANE, *Master.*

205 *Exhibit "E."—Extract.*

The following is a register of the number of certificates of stock, and to whom issued, to wit:

Nos.	Issued to.	
1	J. M. Lore & Co.	
*	* * * *	
*	* * * *	
*	* * * *	
*	* * * *	
*	* * * *	
*	* * * *	
414	To R. Shields.	Transf'd to R. Shields.
415	"	" " Jo. Bayliss.
416	"	" " R. Shields.

I certify that the above extract was truly copied by me from the record book of the "Omaha City Company," as exhibited in evidence by the witness, Byron Reed, being that portion refered to by him in his answer to interrogatory 3d of his testimony the stars between the first line in the column and the figures "414" indicate the omission of the entries between numbers 1 and 414, the above extract being copied and annexed hereto at the request of the solicitor for complainant, and marked as Exhibit "E."

GEORGE W. DOANE, *Master.*

206 *Exhibit "F."—Extract.*

List of deeds made out for the Omaha City Company to the holders of certificates of stock in accordance with the distribution of lots on the 4th Sept., 1855.

No. of certificate.	Lots.	Block.
*	*	*
*	*	*
*	*	*
*	*	*
416, R. Shields.	6,7,8,9,10	46½
	1,2,3	22½
	1,2	58½
	6,7,8,9,10	128½
	1,2,3	59½
	2,3	189½
*	*	*
*	*	*
*	*	*

I certify that the above extract was truly copied by me from the records of the "Omaha City Company," as exhibited in evidence by witness, Byron Reed, being that portion refered to by him in his answers to interrogatory 6th of his testimony, the stars indicating the omissions of the entries preceding that which is made above relative to R. Shields, the above extract being copied and annexed hereto, and marked F, at the request of solicitor for complainant.

GEO. W. DOANE, *Master.*

207 Depositions of witnesses taken in a certain cause pending in the District Court of the 1st judicial district of the Territory of Nebraska within and for the county of Douglas in chancery, wherein Aaron Root is complainant, and Robert Shields, and others are defendants, in pursuance of an order of reference made in said cause at the April term of said court, A. D. 1865, whereby the same was referred to the undersigned as special master to take the testimony and proofs in said cause, and report the same to said court.

AARON ROOT
v.
ROBERT SHIELDS *et al.* } In chancery.

This cause having been referred to me as special master to take and report the proofs of the parties:

It is hereby ordered that Saturday the 19th day of August, A. D. 1865, at 9 o'clock a. m., be appointed at the time, and my offices in Omaha city, Douglas county, Nebraska Territory, as the place for the taking of such proofs.

August 11th, 1865.

GEORGE W. DOANE, *Master.*

According to the above order, I proceeded on the 11th day of August, A. D. 1865, to give notice to James M. Woolworth, esq., solicitor for complainant, and also to A. J. Poppleton, esq., solicitor for Helfenstein, Gore & Co., defendants, and by leaving a copy of said notice at the office of Messrs. Redick & Briggs, solicitors, Cassady and Test, and Baldwin & Dodge, defendants, of the time and place of taking said testimony.

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GEO. W. DOANE, *Master.*

And thereupon, at the time and place above named, the complainant appeared by James M. Woolworth, esq., his solicitors, and Helfenstein, Gore & Co., by A. J. Poppleton, esq., their solicitor, and the said complainant thereupon presented James M. Woolworth as a witness on his behalf, who, being first duly sworn according to law, deposes as follows:

Int. 1st. State whether or not you ever had any conversation with the defendants, Cassady & Test, relative to the defendant, Shields, owning lands in the county of Sarpy, and if so, when, where, and what was said.

(Objected to by solicitor for Helfenstein, Gore & Co., as being incompetent as against these defendants, the admission of Cassady & Test not being evidence against them for any purpose, and therefore irrelevant.)

Ans. I had a conversation certainly with one, I think with both of them, in the fall of 1858 in this place. They stated to me that Shields had conveyed or caused to be conveyed to them, or to some of their clients, and which I do not remember, a large amount of land in Sarpy county, to secure the payment of an indebtedness from him to some of their clients, and that they, either in their own names, or in their clients' names, which I do not remember, had executed bonds to him for a deed of lands, when he should pay the debt. They asked me if such form of security was good in this Territory. I told him I did not think it was. They accordingly caused a mortgage to be prepared to be executed by Shields and his wife upon these lands to secure this debt. They sent it from Council Bluffs to me, in order to procure its excution. I took it to Shields and his wife; they executed it in my presence, and I returned it to Cassady & Test.

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Cross-examined.

By A. J. Poppleton, esq., solicitor for Helfenstein, Gore & Co.:

Cross-int. 1st. Was this communication of Cassady & Test made to you, and was the business of procuring the signature to the mortgage transacted by you in the capacity of attorney or counsel, or counsel for Cassady & Test?

Ans. I will state the circumstances.

(Here sol. for Helfenstein, Gore & Co., objects to any "statement" which is not a direct and explicit answer to the question.)

I make this statement in order that the court and the counsel

making this objection may judge for himself. Some considerable time previous to this Cassady and Test placed in my hands, as attorney, large demands against Shields in favor of Woods, Christy & Co., for collection. I commenced suits upon them, one involving the title to a stone house and block in this city. That suit was agreed to be settled, and one part of the terms of the
210 settlement was that Shields should mortgage these bonds to secure the debt to Woods, Christy & Co., it being agreed that the security to the other creditor, represented by Cassady & Test, should not take precedence to that to Woods, Christy & Co. I consider the taking of the mortgage to Willingham incidental to the other mater. I was not paid anything for doing that business.

JAS. M. WOOLWORTH.

The complainant, Root, here offers in evidence the receiver's receipt to G. C. Monell for the lands purchased by him (Monell) at the public sale heretofore mentioned.

(Objected to by sol. for Helfenstein, Gore & Co., as not being the best evidence of the fact sought to be proved, and becaus no proper foundation for the introduction of such evidence has been laid.)

The said certificate is hereto attached as an exhibit, marked Exhibit "G."

The complainant here offers in evidence a certified copy of a mortgage executed by Robert Shields and wife to William W. Willingham.

(Objected to by sol. for Helfenstein, Gore & Co., as not being the best evidence, as being irrelevant, and because no proper foundation has been laid for its introduction.)

The certified copy is hereto attached as an exhibit, marked Exhibit "H."

The complainant here offered in evidence a certified copy of
211 a deed from Francis Edwards to Cassady & Test, which is hereto attached as an exhibit, marked Exhibit "I."

(Objected to by sol. for Helfenstein, Gore & Co., as not being the best evidence, and because no proper foundation has been laid for its introduction.)

The complainant here offered in evidence a certified copy of a deed from Thomas Hawes to Wm. W. Willingham, which is hereto attached as an exhibit, and marked Exhibit "K."

(Objected to by sol. for Helfenstein, Gore & Co., as not being the best evidence, and being irrelevant, and becaus no proper foundation has been laid for its introduction.)

The complainant here offered in evidence a certified copy of a deed from Richard O'Brien to J. P. Cassady and J. D. Test, which is hereto attached as an exhibit, and marked Exhibit "L."

(Objected to by sol. for Helfenstein, Gore & Co., as not being the best evidence, as being irrelevant, and because no proper foundation has been laid for its introduction.)

The complainant here offered in evidence a certified copy of a

deed from Robert Shields and wife to James D. Test, which is hereto attached as an exhibit, and marked Exhibit "M."

(Objected to by sol. for Helfenstein, Gore & Co. for the reason that no proper foundation has been laid for its introduction.)

The complainant here offered in evidence a certified copy of a deed from Robert Shields and wife to E. V. Smith, which is
212 hereto attached as an exhibit, and marked Exhibit "N."

(Objected to by sol. for Helfenstein, Gore & Co., for the reason that no proper foundation has been laid for its introduction, and because the original thereof appears not to have been properly executed, witnessed and acknowledged.)

And thereupon the further taking of testimony was adjourned until Thursday, the 24th instant, at 9 o'clock, a. m.

GEO. W. DOANE,
Special Master.

According to the above adjournment, at the time above named, to wit, on the 24th day of August, A. D. 1865, at 9 o'clock, a. m., the said complainant, Aaron Root, appeared by J. M. Woolworth, esq., his solicitor, and the defendants, Hefenstein, Gore & Co., by their solicitor, A. J. Poppleton, esq.; and thereupon George Smith was produced as a witness on behalf of complainant, who, being first duly sworn according to law, deposes in answer to interrogatories as follows, to wit:

Int. 1st. Are you acquainted with the improvements made by Aaron Root upon the premises in question in this case? If yea, when were the same made; what is the nature, extent, value and cost thereof? Describe the same and every part thereof fully.

Ans. I am acquainted with the improvements made by Aaron Root upon the premises in question in this case. They were made in 1861 principally. They consist of a house, a barn, fencing,
213 breaking; and there was a well dug, and fruit trees put out and shrubbery—about an acre devoted to fruit trees. I think that covers all of the improvements in a general sense. The cost of all the improvements must have been in the neighborhood of twenty-five hundred dollars. The only way that I can estimate the value of said improvements is to estimate the present cost of making them, which would be about three thousand dollars, I think.

GEO. SMITH.

THE TERRITORY OF NEBRASKA, *Douglas County, ss:*

I, Geo. W. Doane, a special master in chancery, duly appointed to take the testimony and proofs in the foregoing cause, do hereby certify that the above-named James M. Woolworth and George Smith were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing deposition by them respectively subscribed were reduced to writing by me, and written in the presence of said witnesses respectively, and by them respectively subscribed at the time of taking the same in my presence and in the presence of said solicitors of the said parties in attendance

as above stated, and were taken at my office in the city of Omaha, in said county, begining on the 19th day of August, A. D.
214 1865, according to the above order made by me appointing the time and place for taking said proofs, and continued on the 24th day of August, A. D. 1865, according to the order of adjournment above made, where the same was concluded.

In testimony whereof, I have hereto set my hand this 24th day of August, A. D. 1865.

GEO. W. DOANE,
Special Master.

Master's fees.

Making report	$5 00
Swearing 11 witnesses, *a* 10 each	1 10
Copying exhibit and taking testimony, 26,400 words, *a* 15c. per *a*	39 60
Certificates, (2,) *a* 25c. each	50
Paid by def'ts, total	$46 20

Witness fees.

Louis Miller, one day	50
Wm. R. Deavarest, one day	50
Geo. M. Mills, " "	50
E. V. Smith, " "	50
A. J. Poppleton, " "	50
Byron Reed, " "	50
John C. Johnson, " "	50
John H. Sahler, " "	50
G. C. Monell	50
J. M. Woolworth	50
George Smith	50
Total	$5 50

215 *Exhibit "G"—No.* 1404.—*Public sale.*

RECEIVER'S OFFICE AT OMAHA, N. T.,
July 10, 1860.

Received from Gilbert C. Monell, of Douglass county, Nebraska, the sum of one hundred dollars and . cents, being in full for the west ½ of the southwest quarter of section No. 10, in township No. 15 N. of range No. 13 east, containing eighty acres and hundredths, at $1 15-100 per acre.

$100.

O. F. WILSON, *Receiver.*

Exhibit "H."

Robert Shileds and wife to William W. Willingham:

Know all men that we, Robert Shields and his wife, Margaret J. Shields, of the county of Sarpy, and Territory of Nebraska, in consideration of the sum of eighteen hundred and fifty dollars to us paid by Wm. W. Willingham, of Halifax county, Virginia, the receipt whereof is hereby acknowledged, do hereby mortgage, sell, and convey to the said Wm. W. Willingham, his heirs, and assigns forever, the following-described real estate, situated in the county of Sarpy and Territory of Nebraska, to wit, the undivided three-fourths of lot No. 1, in section five, township No. thirteen (13) north of range No. ten (10) east of the sixth principal meridian, containing 32 acres more or less; also the undivided three-fourths of lots
216 five, seven, and the southeast quarter of the southeast quarter of section thirty-two, in township fourteen north of range 10, east of the p. m. line, containing 99 $\frac{40}{100}$ acres more or less; also the southwest quarter of section eleven, in township thirteen N. R. ten east; also the southeast quarter of section ten, in township thirteen N. of range ten east; also the northeast quarter of section ten, in township thirteen north of range ten east; to have and to hold the said several tracts of lands to him, the said grantee, his heirs and assigns forever, with appurtenances thereto belonging, the said grantors hereby covenanting with the grantee, his heirs, and assigns, that we are lawfully seized of the said premises; that the same are free from incumberances, and we will warrant the same against the lawful claims of all persons whomsoever; provided, however, this conveyance is made and executed as a mortgage to secure the payment of a certain note of hand executed by the said Robert Shields to the said Wm. W. Willingham, of even date herewith, for the sum of eighteen hundred and fifty-eight dollars and 30-100, payable six months after date, and if not paid at maturity with interest at the rate of fourty per cent. per annum thereafter; now if said note is fully paid and satisfied when due, then this conveyance shall be null and void, otherwise to be and remain in full force.

Witness our hands and seals this 1st day of October, 1858.

[SEAL.] R. SHIELDS.
[SEAL.] MARGARET J. SHIELDS.

Attest:

JAMES M. WOOLWORTH.

217 TERRITORY OF NEBRASKA, *County of Douglas:*

On the 6th day of October, 1858, before me, the undersigned, a notary public in and for said county, personally appeared, Robert Shields and his wife Margaret J. Shields, personally known to me to be the identical persons whose names are affixed to the above conveyance as grantors, and acknowledged the same for the uses and purpose therein expressed, and the said Margaret J. Shields being examined by me separate and apart from her said husband, and out of his hearing, and the counsels and purposes of said instrument

having been fully explained to her, she declared that she executed the same of her own free will and accord, and without any compulsion of her said husband, and that she is satisfied therewith.

In witness whereof I hereto subscribe my name and affix my notarial seal this 6th day of October, A. D. 1858.

JAMES M. WOOLWORTH.

Filed for record Oct. 9th, 1858, at 11 o'clock a. m.

C. D. KELLER,
Co. Register.

[Seal and stamp.]

SARPY COUNTY, *Register's Office, ss:*

I, George S. Burtch, county clerk and ex-officio register of deeds in and for said county, do hereby certify that the foregoing is
218 a true and correct exemplification of the record of a mortgage, and the certificate of acknowledgment thereof remaining in said office, and of the whole thereof.

Witness my hand and official seal at Bellevue, this 17 day of May, A. D. 1865.

GEO. S. BURTCH,
Co. Clerk and ex-officio Register of Deeds of Sarpy Co., N. T.
By S. F. BURTCH, *Deputy.*

[Seal and 5-cent stamp.]

Exhibit "I."

Francis Edwards.—W. deed to Cassady & Test.

This indenture, made and entered into this 10th day of September, one thousand eight hundred and fifty-seven, between Francis Edwards, of the county of Sarpy, and Territory of Nebraska, party of the first part, and Cassady and Test, of Pottawattamue county, and State of Iowa, parties of the second part, witnesseth that the said party of the first part, in consideration of the sum of two hundred and eighty dollars to him paid, has sold, and by these presents does sell and convey to the said parties of the second part, and their heirs and assigns forever, all that certain piece or parcel of land known and described as follows, lot No. one, of section No. five (5,) in township No. thirteen N. of range No. ten east, containing, by estimate, thirty-two acres; also lots No. five and seven, and the southeast quarter of the southeast quarter ($\frac{1}{4}$) of section No. thirty-two,
219 in township fourteen north of range No. ten (10) east of the 6th principal meridian, containing ninety-nine and $\frac{30}{100}$ acres, be the same more or less, together with all the appurtenance thereunto belonging, and all the estate, title, and interest of the said partys of the first part therein; and the said partys of first part for himself and his heirs hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and is seized of a good and indefeasible estate of inheritance therein,

and that the said premises are free and clear of all incumberances of any and every name and nature; and that the said party of the first part will warrent and defend the same premises, above described, with the appurtenances unto the said party of the second party and their heirs and assigns forever, against each and every person whomsoever lawfully claiming any interest therein.

In testimony whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

FRANCIS EDWARDS.

[L. S.]

Signed, sealed, and delivered in the presence of—
JON. E. ROST.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

On this 10th day of September, 1857, before me, a notary public in and for said county, personally appeared the above-named Francis Edwards, well known to me to be the identical person whose name is affixed to the foregoing instrument as grantor, and acknowledged the same to be his voluntary act and deed.

A. L. KING,
[SEAL.] *Notary Public Douglas County.*

220 Filed for record, Feb. 16th, 1858, at 12½ o'clock p. m.
C. D. KELLER,
Co. Register.

SARPY COUNTY, *Register's Office, ss:*

I, George S. Burtch, county clerk, and ex officio register of deeds, in and for said county, do hereby certify that the foregoing is a true and correct examplification of the record of a deed, and the certificate of acknowledgment thereof remaining in said office, and of the whole thereof.

Witness my hand and official seal this 17th day of May, A. D. 1865.

GEORGE S. BURTCH,
County Clerk and ex-officio Register of Deeds.
By S. G. BURTCH, *Deputy.*

[Seal and 5-cent stamp.]

Exhibit "K."

Thomas Hawes.—Deed to Wm. W. Willingham.

This indenture, made and entered into this 22d day of September, A. D. one thousand eight hundred and fifty-seven, by and between Thomas Haws, of the county of Sarpy, and Territory of Nebraska, of the first part, and Wm. W. Willingham, of the second part, witnesses that the said party of the first part, for and in consideration of the sum of five hundred and fifty dollars current money of the United States to me in hand paid by the said part of the second part, at and

before the executing and delivery of these presents, the receipt whereof I do hereby acknowledge, have granted, bargained, sold, aliened, realeased, and confirmed, and by these presents do
221 fully and absolutely grant, bargain, sell, alien, remise, release, and confirm unto the said party of the second part, and his heirs and assigns forever, all that certain piece or parcel of land lying and being in the county of Sarpy, and Territory of Nebraska, and more particularly described and known as follows, to wit, the southeast quarter of section ten (10,) in township thirteen (13) north of range 10 east of the 6th principal meridian, in Nebraska Territory, together with all and singular the hereditaments and appurtances whatsoever to the said premises belonging, or in anywise appertaining, and the revesion and reversions, remainder and remainders, rents, issue, and profits thereof, and every part and parcel thereof; and also all estate, right, title, interest, property, possession, claim, and demand whatsoever of the party of the first part, his heirs and assigns of, in and to the same, or any part or parcel thereof, to have and to hold the same, with the appertenances unto said party of the second part, his heirs and assigns in fee simple forever; and the said party of the first part and his heirs do hereby covenant and agree to and with the said party of the second part, his heirs and assigns, that I am now owner of the said premises, and am well seized of a good and indefeasible state of inheretance therein, and I have full right and power to sell and covey the same in fee simple absolute; that the said premises are free and clear of all incumberances; that the said party of the second part, his heirs and assigns, may forever hereafter have, hold, posses, and
222 injoy the same without any suit, molestation, or interuption by any persons whatever lawfully claiming any right therein; and the said party of the first part, and all persons claiming under, will at any time hereafter, at the request and expense of the said party of the second part, his heirs and assigns, make all such further assurance for the more effectual conveying of the said premises, with the appertenances, as may be reasonable—required by him or them, and that the said party, his heirs, executors, and administrators will warrant—defend the said premises with the appertenances unto the said party of the second part, and heirs and assigns forever.

In testimony whereof, the said party of the first part has hereunto set his hand, seal, the day and year first above written.

his
THOMAS × HAWES.
mark.

Signed, sealed, and delivered in presence of—
A. MACON.
SAMUEL B. MCCUNE.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

On this 22d day of September, A. D. 1857, before me a notary public in and for said county, personally appeared the above-named Thomas Hawes, known to me to be the identical person whose name

is affixed to the foregoing instrument as grantor, and acknowledges the same to be his voluntary act and deed.

[SEAL] AUGUSTUS MACON,
Notary Public, Douglas County, N. T.

Filed for record March 16th, 1858, 9 o'c. a. m.
C. D. KELLER.
Co. Register.

223 SARPY COUNTY, *Register's Office, ss:*

I, George S. Burtch, county clerk and ex-officio register of deeds in and for said county, do hereby certify that the foregoing is a true and correct exemplification of the record for a deed, and the certificate of acknowledgment thereof remaining in said office and of the whole thereof.

Witness my hand and official seal at Bellevue, this 18th day of May, 1865.

GEO. S. BURTCH,
County Clerk and ex-officio Register of Deeds.
By S. T. BURTCH, *Deputy.*

[Seal and 5-ct. stamp.]

Exhibit L.

Richard O'Brien.—Deed to J. P. Cassady and J. D. Test.

This indenture, made this 10th day of September, in the year of our Lord one thousand eight hundred and fifty-seven, between Richard O'Brien, in the county of Sarpy, and Territory of Nebraska, party of the first part, and J. P. Cassady and J. D. Test, of the city of Council Bluffs, in the county of Pottawattamie and State of Iowa, party of the second part, witnesseth, that the said party of the first part, in consideration of the sum of two hundred and eighty dollars to him in hand paid by said parties of the second part, the receipt whereof is hereby acknowledged, does by this present grant, sell, bargain and covey unto the said parties of the second part, their heirs and assignes forever, all his interest in the tract or parcel of land lying and being in the county of Sarpy, and Territory of Nebraska, and described as follows, to wit: the southwest quarter
224 $\frac{1}{4}$ of section (11), in township thirteen (13,) north of range ten (10) east of the 6th principal meridian, Nebraska Territory, containing 160 acres, be the same more or less, to have and to hold the same, together with all the heredetiments and appurtenances thereunto in anywise appertaining; and the said party of the first part does expressly covenant and agree with the said parties of the second part, their heirs and assigns, that he is lawfully seized of the said premises, that the said premises are free from all incumberances, that he has a good right to convey the same as aforesaid, that the said parties of the second part, their heirs and assigns, shall quietly enjoy and possess the same, and that the said party of the first will warrant and defend the title to the same against all lawful claims.

In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

[SEAL.] RICHARD his + mark. O'BRIEN.

In presence of—
A. R. SMITH.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

On this 10th day of September, 1857, before me, the undersigned, personly appeared Richard O'Brien, the signor and sealer of the foregoing deed, and acknowledged the same to be his voluntary act and deed; and I further certify that I know the person making the said acknowledgment to be the identical person whose name is affixed to said deed as grantor.

A. L. KING, *Notary Public.*

Filed for record, Feb. 20, 1858, at 10 o'c. p. m.
C. D. KELLER, *Co. Register.*

225 SARPY COUNTY, *Register's Office, ss:*

I, Geo. S. Burtch, county clerk and ex-officio register of deeds in and for said county, do hereby certify that the foregoing is a true and correct exemplification of the record of a deed and the certificate of acknowledgment thereof remaining in said office and of the whole thereof.

Witness my hand and official seal at Belleview this 17th day of May, 1865.

GEO. S. BURTCH,
County Clerk, ex-officio Register of Deeds.
By S. T. BURTCH, *Deputy.*

[Seal and 5-cent stamp.]

Exhibit "M."

This indenture, made this 23d day of November, in the year one thousand eight hundred and fifty-seven, between Robert Shields and Margaret J., his wife of the city of Omaha, in the county of Douglas and Territory of Nebraska, of the first part, and James D. Test of the second part, witnesseth, that the said parties of the first part, in consideration of the sum of ten thousand dollars to them duly paid before the delivery hereof, have granted, bargained, and sold, and by these presents do grant, bargain, sell, and covey to the said party of the second part, his heirs, assigns, forever all the undivided one-half of the west half of the southwest quarter of section No. ten (10) and the north half of the northwest quarter of section No. fifteen (15)
in township No. fifteen (15) north of range No. thirteen east
226 of the 6th principal meridian, in Nebraska Territory, with the appertenances and all the estate title and interest of the said parties of the first part therein; and the said parties of the first part

do hereby covenant and agree with the said party of the second part that they are the lawful owner of the premises above granted, and seized thereof in fee simple absolute, that they will warrent and defend the above granted premises in the quiet and peaceable possession of the said party of the second part, and his heirs and assigns forever, and that they are free from all incumberances whatsoever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

[SEAL.] ROBERT SHIELDS.
[SEAL.] MARGARET J. SHIELDS.

Signed sealed and delivered in presence of—
JAMES M. WOOLWORTH.

TERRITORY OF NEBRASKA, *County, ss:*

I, James M. Woolworth, a notary public in and for said county and Territory of aforesaid, do hereby certify that Robert Shields and Margaret J., personally known to me as the same persons whose names are subscribed to the above deed, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said insterment of writing as there free and voluntary act for the uses and purposes therein set forth, and the said Margaret J., wife of the said Robert Shields, having been by me examined, separate and apart, and out of hearing of her said husband, and the con-
227 tents and meaning of the said instrument of writing having been by me made known to her, acknowledged that she freely and voluntarily executed the same, and relinquishes her dower to the lands and tenements therein mentioned without compulsion of her said husband, and that she does not wish to retact the same.

Given under my hand and seal this twenty-third day of November, A. D. 1857.

[SEAL.] JAMES M. WOOLWORTH,
Notary Public.

Filed and recorded Nov. 23d, 1857, at 11 o'c. m.
Attest: THOMAS O'CONNOR, *Regs.*

THE TERRITORY OF NEBRASKA,
County of Douglas, ss:

I, Byron Reed, county clerk and ex-officio register of deeds in and for said county, do hereby certify that the foregoing is a true and correct copy from the records of said county.

Witness my hand and official seal this 19th day of August, 1865.

BYRON REED,
County Clerk.

[5-cent stamp.]

Exhibit "N."

This indenture, made this twenty-sixth day of January, one thousand eight hundred fifty-eight, between Robert Shield, of Omaha, Nebraska, and Margaret J., his wife, parties of the first part, and E. V. Smith, party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of three
228 thousand dollars to them paid, have sold and confirmed unto the said party of the second part the following described premises, and all the appurtenances thereto belonging, viz: the undivided half of the southwest half of the southwest quarter of section ten, (10,) and the north half of the northwest quarter of section fifteen, (15,) in township fifteen (15,) north of range thirteen (13,) east, saving and reserving therefrom ten (10) lots in block one hundred and twenty-eight, (128,) and the said parties of first part do hereby covenant with the said party of the second part that they are the legal owners and holders of said premises, that the same are free and clear of all incumberances whatsoever, that they will forever warrant and defend the same unto the said party, his heirs and assigns forever, against the legal claims of all persons whomsoever.

In witness whereof the said parties of the first part have hereto set their hands and seals the day and year first above written.

[SEAL.] ROBERT SHIELDS.
[SEAL.] MARGARET SHIELDS.

Signed in the presence of—

TERRITORY OF NEBRASKA,
Douglas County, ss:

On this 27th day of January, 1858, personally appeared before me, a notary public, Robert Shields and Margaret J., his wife, to me known to be the persons who executed the above instrument as grantors, and acknowledged the same to be their voluntary act and deed.

[SEAL.] ALFRED SAYRE,
Notary Public for Douglas County.

229 Filed and recorded Jan. 28, 1858, at 11 o'c. a. m.
Attest: THOMAS O'CONNOR, *Reg'r.*

THE TERRITORY OF NEBRASKA,
County of Douglas, ss:

I, Byron Reed, county clerk and ex-officio register of deeds within and for said county, do hereby certify that the foregoing is a true and correct copy from the records of said county.

Witness my hand and official seal this 19th day [day] of August, 1865.

BYRON REED,
County Clerk.

[5-cent stamp.]

230 *Defendant's depositions.*

Lorin Miller, produced as a witness for defendants, represented Messrs. Reddick, Briggs & A. J. Poppleton, esq., being first duly sworn according to law, deposes in answer to interrogatories as follows:

State what you kno. in regard to the existence of an association known as the Omaha Claim Club, in the years 1855, 1856, and 1857, and if you sh'd answer there was such an association, state what its object and purpose were, and also state what you kno. of a co.. known as the Omaha City Co., and whether or not all its members who resided in this Terr'y were not also members of the O. Claim Club. State their names and the positions they held in the Claim Club and the gov't, if you know.

(Ob'j as immaterial and irrelevant by sol'r for compl't.)

Ans. I understood there was such an asso., and its object and purpose were to prevent people from pre-empting lands w'h had been claimed by any one. I did not belong to that institution. I kno. there was such a co. existed at that time as the Omoha City Co, I think all the members of the Omaha City Co. who resided in this Terr'y were also members of the Claim Club, except Enos Lowe. I do not know whether he belonged to it or not. Their names and positions were as follows: Jesse Lowe, who was Mayor of the city of Omaha in 1857; S. B. Cuming, who was sec. of the Terr'y, and acting Gov.

Int. 2. State whether or not all claims upon the public lands (so called) were not held and protected by the power of this club.

I do not kno. whether they were all so held or not, but as a general thing they were so held, so far as I knew.

3. W'ld it have been safe for a person to have filed upon or attempted to pre-empt any portions of sec's 10 and 15 adjoining this city, w'h was claimed by the O. City Co. in the years 1855,

231 or 1856, or fore part of 1857?

(Ob'j as immaterial and irrelevant by sol. for compl't.)

I don't kno. in what part of the year 1854 the co. was formed, but after it was formed, and thro. that year and 1856, and the fore part of 1857, I think that no man w'ld have been safe to have filed or pre't, or have attempted to pre't any portion of those lands.

4. Please state whether any one of the members of the O. City Co. ever actually occupied any portion of the above described lands, and whether they did not issue paper cer'ts and circulated them on speculation.

(Obj'd to as immaterial and irrelevant by sol's for compl'ts.)

They did not occupy the lands to my knowledge. They did issue script and put it upon the market for sale for those lots.

5. How long have you resided in this city? and state whether or not you are familiar with the original survey or plat thereof, and the various additions attached thereto, and if so, state about the No. of acres of land this city and its additions userped in the years 1856 and 1857.

(Obj. to as immaterial and irrelevant, and calls for the opinion of the witness instead of the facts, by sol. for compl't.)

I have resided here 10 years and ½. I am familiar with the original survey and platt of O. city, but I am not very well posted on the additions. The No. of acres included in the city and additions in the years 1856 and 1857 were about, or not less than 4,500 acres.

6. State about the average population this city has contained, with its additions, up to this time.

(Objected to as immaterial and irrelevant by soli's for compl't.)

Something over 3,000 people.

7. How far is the tract of land pre'd by R. S. from the centre of O. city proper? and state whether any person ever made any
232 impro'ts on that tract prior to the fall of 1857, except said Shields.

(Objected to as immaterial and irrelevant by solicitor for complainant.)

I can't say exactly the distance, but I sh'd think the S. pre'n was a mile and a ½ from Farnham st. I don't kno. of any imp'ts upon the land pre-empted by S. prior to 1857, except that made by him after the O. City Co. claimed it.

8. State whether R. S. was not the 1st actual settler on that land.

I believe he was.

LORIN MILLER.

William R. Demorest, produced as a witness on behalf of the defendants, being first duly sworn according to law, as hereinafter certified, deposes in answer to interrogatories as follows:

Int 1. What do you kno. of an ass'n called the O. Claim Club, in 1856 and 1857, in the city of O., and were you not a member thereof, and about how many men c'ld have been mustered together on short notice to put a man off from a piece of land, say in the spring of 1857?

(Objected to by sol's for compl't as immaterial and irrelevant.)

I have no personal knowl. of such an organization. I was not a member of it. From what I saw in those days, I supposed from 50 to 60 men cl'd be got together under the lead of any influential man to do anything he wanted done, I don't care what it was.

2. Were you not a member of a Claim Club formed 10 miles west of this city, w'h acted in conjunction with the Omaha Club on heavy occasions?

(Objected by sol's for compl't as immaterial and irrelevant.)

I was a member of a club called the Pappillion Claim Club, organized in this city for the benefit of those who owned land at that time on what was called the frontier, 10 miles west of Omaha. I have no knowl. of that club being called out by the O. club, or acting in conjunction with it.

233 State whether or not, as a general thing, the claims upon the public lands in and about the city of O. were held by what was known as the Claim Club formed for mutual protection during the years 1855, 1856, and the spring of 1857.

(Objected to by sol. for compl's as immaterial and irrelevant.)

I think lands outside the city of Omaha were so held during 1857, but I think not before that. The first claim club I heard of in Omaha was in the fall of 1856.

WM. R. DEMAREST.

OCT. 5.

234 John T. Baldwin, of lawful age, produced as a witness for the defendants, being first duly sworn according to law, deposes in answer to interrogatories as follows:

By John I. Redich, esq., solicitor for def'ts:

Interrogatory 1st. What is your age and place of residence, and are you acquainted with the tract of land pre-empted by Robert Shields, near the city of Omaha?

Ans. My age is 44 years. I am a resident of Council Bluffs, Iowa. I am acquainted with the tract of land spoken of.

Int. 2d. What interest, if any have you in that tract of land?

Ans. I have a joint interest with Gen. Grenville M. Dodge in 20 acres of it; a portion of it, of about an acre, has a house on it.

Int. 3d. When did you and General Dodge purchase that interest? State as nearly as you can.

Ans. I think it was in the fall of 1857.

Int. 4th. Of whom did you purchase, and what did you pay for the interest?

235 (Objected to by sol. for compl's as not the best evidence.)

Ans. I bought of James D. Test, and paid not less than twenty-five hundred dollars.

Int. 5th. At the time you bought, state whether you had any knowledge or information in regard to the character of the pre-emption made by Robert Shields. If you should answer you had not, then state whether you purchased the same in good faith, and paid therefor a valuable consideration.

Ans. I had no such knowledge or information, and General Dodge was not in the country, and I bought his interest for him. I did buy the land in good faith, and paid for the same a valuable consideration.

Int. 6th. State whether or not you afterwards learned at some time ——

(Question waived.)

Int. 7th. Was you present at the sale of said land by the government in this city, at which sale Evert V. Smith purchased one portion, and Dr. G. C. Monell the balance? and if you should answer you were, state whether you had or not any conversation with

236 the said E. V. Smith in regard to this tract of land, and if so state what was said.

Ans. I was not present at the sale, but the day before the sale I had a conversation with Mr. Smith in regard to bidding the land off at the sale. I told him that I was going to come here and bid. He said that he had an arrangement with the city authorities, or with a committee appointed by the council to bid the land off. He said that if I would stay away from the sale he would bid it off, and deed me

what I claimed, forty acres, at that time, in connection with Gen. Dodge.

Int. 8th. Then state what was the only inducement to keep you from attending at that sale and bidding for the purpose of protecting the interest of you and Gen. Dodge, which you had before purchased as above stated.

Ans. Because Mr. Smith told me that he would bid it off and deed me the land.

Int. 9. Has Smith deeded the land, or does he refuse?

Ans. He has not deeded, and refuses to do so.

237 Int. 10th. Were you acquainted with the value of that land at the time of the public sale, and if so, state what was the market value of the land at that time.

Ans. I can't say that I was acquainted with the value. I think I could have sold it for fifty dollars an acre. I was offered that if I could make a title.

Int. 11th. Had you ever any conversation with George M. Mills relative to his determination that Root should maintain this action; and if so, what did he say?

(Objected to by sol. for comp'l on the ground that it is immaterial and hearsay.)

Ans. I have had such conversation. He said that he was going to gain the land; that he (Mills) would spend four or five thousand dollars to gain the suit.

Int. 12th. Do you mean to have Root gain the suit?

Ans. Yes, and himself too. He spoke of both of them.

Int. 13. Are you acquainted with the pre-emptor of this land, Robert Shields, and if so, have you had any conversation with

238 him in regard to what was known as the "Omaha Claim Club" running him off this tract, burning his house, &c., and what Shields said in regard to his determination ultimately to pre-empt that land?

(Objected to by sol. for compl. as hearsay.)

Ans. I am acquainted with Shields. He told me that there were parties here who threatened to tear his house down and burn it, and kill him if he didn't leave. He said that the pre-emption was right, and that he was entitled to it, and was going to have it.

Cross-examined.

By J. M. Woolworth, esq., sol. for complainant:

Cross int. 1st. When did the public sale you have spoken of for this land take place?

(Objected to by sol. for def'ts as not the best evidence.)

Ans. I don't recollect the year.

Cross-int. 2d. Where did the conversation you say you had with Smith take place?

Ans. In Mr. Seeley's law office, in Omaha.

Cross-int. 3d. Who was present?

239 Ans. There were Mr. Seeley, and Mr. Smith, and Mr. Test, and myself.

Cross-int. 4th. Did you not assist, with others interested on the same side with yourself, in defending Shield's pre-emption right in the local land office and the General Land Office, and before the Secretary of the Interior?

(Objected to by sol. for deft's, as not proper cross-examination.)

Ans. I don't think I assisted very materially before the local land office. I made some effort before the General Land Office and the Secretary of the Interior, in the way of employing attornies.

Cross-int. 5th. Did you, or any of the parties interested with you, in your efforts to secure this land before the Land Department, take any steps, or cause any steps to be taken by counsel, to have the public sale you have spoken of set aside?

(Objected to by sol. for deft's as not proper cross-examination, and hearsay, so far as all parties are concerned except himself.)

Ans. Not that I recollect of.

240 Cross-int. 6th. Do you know whether any proceedings were had for that purpose?

(Objected to as not proper cross-examination, and not the best evidence.)

Ans. I do not.

Cross-int. 7th. What answer did you give to Mr. Mills when he told you he would spend four or five thousand dollars on this lawsuit?

Ans. I don't recollect.

Cross-int. 8. Don't you remember saying something to him to the effect that some other person, mentioned by you, would either spend a good deal of money, or make great efforts to secure the land for you and persons interested on the same side with you?

Ans. I don't recollect of saying anything of the kind.

JOHN T. BALDWIN.

Also Jefferson P. Cassidy, of lawful age, produced as a witness on behalf of the defendants, being first duly sworn according to law, deposes, in answer to interrogatories, as follows:

241 By Jno. J. Redick, esq., solicitor for def'ts:

Int. 1st. State your age and place of residence; and are you acquainted with the tract of land pre-empted by Robert Shields, adjoining Omaha city on the north?

Ans. I am 37 years of age, and reside in Council Bluffs, Iowa. I am acquainted with the tract of land alluded to, but cannot give the numbers.

Int. 2d. State whether or not you purchased any portion of that tract, and if so, about when, and what interest you purchased, and how much of an interest do you now own in that tract?

Ans. Cassidy and Test purchased an undivided eighty acres in said tract. I believe the conveyance was made to James D. Test, but the purchase was for Cassidy and Test. The purchase was made some time in 1857, after Shield's pre-emption. Cassidy and Test now own an undivided interest of twenty acres.

Int. 3d. State what you and Mr. Test paid for the interest which you say you bought.

Ans. About thirty-five hundred dollars. I cannot find the
242 exact amount. Not less than three thousand dollars.

Int. 4th. At the time you bought and paid for said interest had you any knwledge of the character of the pre-emption of Robert Shields, other than its being bona fide and good?

(Objected to as leading.)

Ans. I had not. Had I have had any knowledge that it was not good, I should not have purchased.

Int. 5th. Was there or was there not any arrangement made between you and Mr. Shields by which you were to furnish him money or property, for the purpose of procuring the pre-emption of that land, and by which arrangement you were to be deeded any part of it?

(Objected to by sol. for compl't as leading.)

Ans. There was no arrangement of that kind.

J. P. CASSADY.

Also James D. Test, of lawful age, produced as a witness for the defendants, being first duly sworn according to law, deposes, in answer to interrogatories, as follows:

243 By John J. Redick, esq., solicitor for defts.

State your age and place of residence, and are you acquainted with the tract of land pre-empted by Robert Shields adjoining the city of Omaha on the north?

Ans. I am thirty-six years of age, and reside in Council Bluffs, Iowa; I am acquainted with the tract of land spoken of.

Int. 2d. State whether or not you purchased an interest in that tract, and if so, how much, and about when; and what interest do you own at this time?

Ans. I purchased for Cassidy and Test, of which I was one of the partners, an interest amounting to eighty acres, very soon after the pre-emption was perfected, or the first certificate of entry was given to Mr. Shields. We, Cassidy and Test, sold to John P. Baldwin, of Council Bluffs, one-half of our interest. The balance we own yet, subject to a condition made by Mr. Cassidy, the purport of which I do not exactly know.

Int. 3d. What did you pay for the interest which you have bought?

244 Ans. We paid between three thousand and thirty-five hundred dollars, and paid it in gold coin.

Int. 4th. At the time you bought and paid for that interest, had you, or had you not, any knowledge of the character of Shields' pre-emption, other than that it was bona fide and good?

(Objected to by sol. for compl't as leading.)

Ans. The representations made to me by Mr. Shields were that it was a good pre-emption, made in good faith, and strictly in compliance with the law; and I had no knowledge other than that it was a bona-fide pre-emption, from him or any one else.

Int. 5th. State whether or not there was any arrangement made between you and him by which you were to furnish him any money or property, and procure through him the pre-emption of said land, with the understanding or arrangement that he was to convey to you any portion of it afterwards. If there was such an arrangement, or any arrangement of any kind, please state what it was.

(Objected to by sol. for compl't as leading.)

Ans. There was no arrangement or agreement of any kind
245 between Mr. Shields and myself prior to the issuing of the certificate of pre-emption, or at any other time, by which I or Cassidy and Test was to furnish him with money to complete his pre-emption, or enter the land after his pre-emption right was proved up.

Int. 6th. State what Robert Shields told you, if anything, as to the "Omaha Claim Club" driving him from the land and threatening to burn his house and take his life, and in regard to his ultimate determination to pre-empt the land.

(Objected to by sol. for compl't as immaterial and leading.)

Ans. In my first conversations with Mr. Shields he never mentioned anything to me of any troubles connected with his pre-emption of the land; but he afterwards told me that threats had been made against his life by parties in Omaha, I don't know who, and that he had had a great deal of trouble in protecting his right of pre-emption.

Int. 7th. Some time between the years '59 and '60, you filed an affidavit in the Land Department at Washington city, setting forth, among other things, that the certificate of pre-emption of said
246 tract had been delivered to you by Robert Shields, and that you had the same in your possession; that you had examined your papers and was unable to find it at that time, and that you believed it to be mislaid or lost. It since appears that that certificate is in the possession of James G. Megrath, of this city, and perhaps was at the date of that affidavit. Will you please now explain how he came to get it, and when you first learned that he had it, as near as you can recollect?

Ans. About the time mentioned, I sent an affidavit to Finley Bigger, of Washington city, stating that the certificate of entry had been in my possession, and that I had lost or mislaid it. This affidavit was to have been filed in the Land Office at Washington city. The facts were that I did have the certificate of pre-emption in my possession some time before that affidavit was made, and when the affidavit was made, I thought I had lost or mislaid the certificate, and do not now know how it ever got out of my possession, and never knew that it was in the possession of James G. Megrath,
247 or any other person, until about a year or a little more ago.

Int. 8th. Did you ever have any conversation with E. V. Smith, in which you intimated to him that you or Mr. Casady, or either of the gentlemen interested in this affair, were furnishing Mr. Shields money or property in order to procure the pre-emption of this land through Shields?

Ans. I never had any conversation with Mr. Smith, or any one else, to the effect that I was furnishing Mr. Shields money or property for the purpose of pre-empting that land.

Cross-examined.

By J. M. Woolworth, esq., solicitor for compl't:

Cross-int. 1st. Were you and Mr. Casady partners? If so, in what business?

(Objected to by sol. for def'ts as not proper cross-examination.)

Ans. We were partners as lawyers and land agents.

Cross-int. 2d. During what period of time were you so engaged in that business?

(Objected to by sol. for def's as not proper cross-examination.)

Ans. Well, from 1854 to 1858 or 1859.

248 Cross-int. 3d. Was the purchase from Shields you have spoken of made with the partnership funds?

(Objected to by sol. for def'ts as not proper cross-examination and immaterial.)

Ans. It was.

Cross-int. 4th. Was the conveyance by you to Casady made in consideration of the original purchase?

(Objected to by sol. for def'ts as not proper cross-examination and immaterial.)

Ans. It was.

Cross-int. 5th. Did Casady pay you any consideration for your deed to him, except the original arrangement when you bought from Shields?

Ans. He did not.

Cross-int. 6th. Who was present when Shields executed the deed to you?

Ans. The only persons I remember of were Mr. Woolworth and myself.

Cross-int. 7th. Was any part of the consideration for Shields' deed paid at that time?

Ans. I don't remember.

Cross-int. 8th. How long have you known Shields?

Ans. Say since 1855.

249 Cross-int. 9th. Did not your firm have dealings with him in 1857, previous to the transaction you have spoken of?

(Objected to by sol. for def'ts as immaterial.)

Ans. We had some dealings with him previous to the transaction spoken of, but I don't remember whether they were in 1857, or what year they were in.

Cross-int. 10th. Were you not his attorney in the matter of pre-empting these lands?

(Objected to by sol. for def'ts as not proper cross-examination.)

Ans. I was his attorney in connection with Mr. Woolworth, but not until after the pre-emption certificate had been issued and I had bought, and not until after the reinvestigation, in May 1858.

Cross-int. 11th. Were you employed by Shields at that time as his

attorney, or did you act in the matter in defence of your own interests?

(Objected to by sol. for def'ts as not proper cross-examination.)

Ans. I was employed by him as attorney, and acted at the same time in defence of my own interests.

250 Cross-int. 12th. Were you paid by him for your services as his attorney?

(Objected to by sol. for def't's as not proper cross-examination and immaterial.)

Ans. I was.

Cross-int. 13th. When?

Ans. I don't remember. It was paid in a final settlement of that and other matters.

Cross-int 14th. Were you present when Shields proved his right to pre-empt these lands?

Ans. I was not. Shields told me that John A. Parker, junior, attended to it for him and gave him assurances that it was right.

Cross-int 15th. Did he tell you that before or after he proved up?

Ans. After.

Cross-int 16th. Did you not know that Shields intended to try to pre-empt these lands before he proved up?

Ans. I believe he told me so.

Cross-int 17th. Did you not talk with him about the objections to his pre-emption right, before he proved up?

251 (Objected to by sol. for def'ts as not proper cross-examination and leading.)

Ans. I don't remember of speaking to him about any objections to his right of pre-emption.

Cross-int 18th. How long was it before he proved up that he told you he intended to pre-empt these lands?

(Objected to by sol. for def'ts as not proper cross-examination.)

Ans. I don't remember. If he ever told so, I don't remember how long it was.

Cross-int. 19th. Was it a week, or a month, or two months?

Ans. Well, if he ever told me so it may have been a week, or a month, or two months; I don't remember.

Cross-int 20th. Didn't you, before Shields proved up, inquire of the land officers if he would be permitted to do so?

(Objected to by sol. for def'ts as not proper cross-examination.)

Ans. I did not.

Cross-int 20th. Did not you obtain information from them

252 on that subject before he proved up?

(Objected to by sol. for def'ts as not proper cross-examination.)

Ans. I did not.

Cross-int 22d. You say Shields paid you your attorney's fees for defending his pre-emption right upon final settlement of that and other matters. When did that settlement take place?

(Objected to as not proper cross-examination.)

Ans. I do not remember the exact time; it was some time after my purchase of this property of him.

Cross-int 23d. State when it was as near as you can?

Ans. Well, I have answered it before as fully as I can answer it.

Cross-int 24th. Was the balance of the purchase money paid or settled at that time?

Ans. I believe it was.

Cross-int 25th. Were any other matters settled between you at that time, but the balance of the purchase money going to him and your attorney's fees?

(Objected to by sol. for def'ts as not proper cross-examina-
253 tion, and seeking to mislead the witness to some extent, in this, that if it does not appear how much of the purchase money remained unpaid at the time, nor does it possitively appear that any portion of the purchase money remained unpaid.)

Ans. There was an unsettled account for money which we had loaned to him, which was settled at this final settlement.

Cross-int 26th. Were there at that time involved in that settlement land warrants or any other property, or was the settlement a settlement of mere money account, together with your fees?

(Objected to by sol. for def'ts as not proper cross-examination and immaterial as to all the defendants, except the witness.)

Ans. I don't think there was any land warrant account settled at that time.

Cross-int 27th. Then according to your best recollection the settlement was confined to money matters and your attorney's fees; was it?

Ans. According to my best recollection it was principally for money that we had loaned him.

254 Cross-int 28th. Did he ever borrow land warrants from you?

(Objected to by sol. for def'ts as not proper cross-examination.)

Ans. He may have done so, but I think that Casady and myself loaned him warrants as the agent for other parties and not for ourselves.

Re-examined.

By J. I. Redick, esq., solicitor for defendants:

Int. 1st. At the time you loaned him warrants did you not keep an entire separate account in the names of the parties for whom you acted?

Ans. We did.

Int 2d. At the time the deed was made by Shields and wife to you, who paid Mr. Woolworth for taking the acknowledgem't and employed him for that purpose?

Ans. I think I did.

Int 3d. At the time of the reinvestigation in the Land Department of which you speak as being associated with Mr. Woolworth, whose counsel was he, and whom was he representing? Was he acting for or against Shields?

255 Ans. He was for Mr. Shields, representing that interest.

JAMES D. TEST.

Also John I. Redick, of lawful age, produced as a witness on behalf of defendants, being first duly sworn, according to law, deposes as follows:

Int 1st. Are you acquainted with Aaron Root, the complainant in this cause, and with the land in dispute, and what do you know about the purchase by this complainant of his interest in said tract from Dr. Monell representing the city of Omaha; and what is your occupation?

Ans. Well, sir, I am acquainted with Aaron Root, and the land in dispute, and have been so since 1856, and I recollect at the time the complainant bid off his present interest in this tract at a sale purporting to be at the instance of the city of Omaha, and before complainant had paid anything on said tract, he came into the office of Redick
256 and Briggs, in this city and talked to us in regard to his being about to buy the interest, stating that he only had to pay for it in Omaha city scrip, and had quite a large quantity on hand, and could buy the balance at 20 or 25 cents on the dollar. We advised him not to buy the interest at all, saying that if he did he would buy a lawsuit that would last him a lifetime, or words to that effect; that the land had been pre-empted by Bob Shields and had passed into the hands of other men, and that they would fight him in regard to it. What reply he made to us I don't remember, but Mr. Briggs and myself both advised him against the purchase, for the reasons stated.

(Objected to by sol. for compl't as not responsive to the question, and as stating matters of professional confidence.)

Int 2d. Were you or Mr. Briggs the attorney of Mr. Root at that time, and did he or did he not approach you on that subject as attorneys?

Ans. We were neither of us attorneys for Mr. Root at that time, but were attorneys-at-law and familiar with title in and about
257 the city. We charged Mr. Root nothing for our opinions, but gave them to him as friends.

JOHN I. REDICK.

Also Jefferson P. Casady recalled by Jno. J. Redick, esq., solicitor for defendants, deposes in answer to interrogatories as follows:

By Jno. J. Redick, esq., solicitor for defendants:

Int 1st. I see by the testimony of Mr. Woolworth that you and he had some conversation in regard to lands in Sarpy county, about which Shields had something to do. Will you state whether or not Shields was the owner of or had the title to any lands in Sarpy county growing out of the transactions to which Mr. Woolworth alludes?

(Objected to as not the best evidence and leading.)

Ans. I don't now remember about having had any such conversation with Mr. Woolworth. Mr. Shields obtained title to no lands which passed through the hands of Casady and Test. I know
258 nothing about Shields owning any lands in Sarpy county. The record will be the best evidence of that. Mr. Shields came to

our office in Council Bluffs and obtained some two or three land warrants for other parties who he said wished to use them in paying for lands they desired to pre-empt, and which they did use in that way. As soon as the lands were entered they were conveyed by the pre-emptors to, I think, William W. Willingham, for whom we acted. The land was entered by Willingham for those parties on time; the land never was paid for by the pre-emptors or any else, and still stands in the name of Willingham. Shields represented that he got an assignment of those bonds to his wife. In order to settle a demand against Shields which we had for collection, he gave us a new note, and a mortgage on some land in Sarpy county, but he had no title to the land. Those lands still stand in the name of Willingham, I think.

J. P. CASSIDY.

259

260 *Deposition of James M. Woolworth, esq., in the case of Aaron Root vs. Robert Shields, et al.*

Int. 1st. State whether or not you ever had any conversation with Casady and Test relative to the defendant Shields owning lands in the county of Sarpy, and if so, when, where. and what was said.

(Objected to by sol. for Holfenstein, Gore & Co., as being incompetent as against those defendants, the admission of Casady and Test not being evidence against them for any purpose, and therefore irrelevant.)

Ans. I had a conversation certainly with one, I think with both of them, in the fall of 1858, in this place; they stated to me that Shields had conveyed or caused to be conveyed to them or to some of their clients, and which I do not remember, a large amount of lands in Sarpy county, to secure the payment of an indebtedness from him to some of their clients, and that they either in their own names or in their clients' names, which I do not remember, had executed bonds to him for a deed of the lands when he should pay the debt; they asked me if such form of security was good in this Territory; I told him I did not think it was; they accordingly caused a mortgage

261 to be prepared to be executed by Shields and his wife upon these lands to secure this debt; they sent it from Council Bluffs to me in order to procure its execution; I took it to Shields and his wife; they executed it in my presence, and I returned it to Casady and Test.

Cross-examined.

By A. J. Poppleton, esq., sol. for Holfenstein, Gore & Co.:

Cross-int. 1st. Was this communication of Cassady and Test made to you, and was the business of procuring the signature to the mortgage transacted by you in the capacity of attorney or counsel for Casady and Test?

Ans. I will state the circumstances.

(Here sol. for Holfenstein, Gore & Co., objects to any "statement" which is not a direct and explicit answer to the question.)

I make this statement in order that the court and the counsel making this objection may judge for himself.

Some considerable time previous to this, Casady and Test placed in my hands as attorney large demands against Shields in favor of Woods, Christy & Co., for collection; I commenced suit upon
262 them, one involving the title to a storehouse and block in this city; that suit was agreed to be settled, and one part of the terms of settlement was that Shields should mortgage these lands to secure the debt to Woods, Christy & Co., it being agreed that the security to the other creditors, represented by Casady and Test, should not take precedence to that to Woods, Christy & Co. I consider the taking of the mortgage to Willingham incidental to the other matter. I was not paid anything for doing that business.

JAS. M. WOOLWORTH.

Deposition of George Smith.

Int. 1st. Are you acquainted with the improvements made by Aaron Root upon the premises in question in this case? If yea, when were the same made, what is the nature, extent, value and cost thereof? Describe the same and every part thereof, fully.

Ans. I am acquainted with the improvements made by Aaron Root upon the premises in question in this case; they were made in 1861, principally; they consist a house, a barn, fencing, breaking,
263 and there was a well dug, and fruit trees put out and shrubbery; about an acre devoted to fruit trees; I think that covers all the improvements in a general sense; the cost of all the improvements must have been in the neighborhood of twenty-five hundred dollars; the only way I can estimate the value of said improvements is to estimate the present cost of making them, which would be about three thousand dollars, I should think.

GEO. SMITH.

264 And thereupon the further taking of testimony on behalf of defendants, Baldwin and Dodge, and Cassady and Test, *et al.*, was continued until such time as should be agreed upon by the parties hereto.

And now at this day, to wit, on the 15th day of October, A. D. 1866, by consent of parties, the taking of testimony herein is resumed at the office of Messrs Reddick and Briggs, in the city of Omaha, Nebraska Territory.

And thereupon the said defendants offered in evidence a deed made by Robert Shields and wife to James D. Test, conveying the premises in question, dated Nov. 23d, 1857, and requested the same be attached to this deposition as Exhibit "O," which is done accordingly.

And the said respondents also offered in evidence a deed made by James D. Test and his wife to Jefferson P. Cassady, conveying the undivided one-eighth of the premises in controversy, dated January 8th, A. D. 1858, and requested that the same be attached to this deposition as Exhibit "P," which is done accordingly.

And the said respondents further offered in evidence a deed made by James D. Test and his wife to John T. Baldwin and G. M. Dodge, conveying an undivided one-fourth of the premises in controversy herein, and other property, dated December 15, A. D. 1857,
265 and requested be attached hereto as an exhibit, marked Exhibit "Q," which is done accordingly.

To the introduction of which deeds as evidence herein, complainant's solicitor makes objection.

And thereupon, by consent of solicitor for respondents, the said complainant offered in evidence a deed made by Gilbert C. Monell and wife to Aaron Root, dated November 20, A. D. 1860, and requested that the same be attached to this deposition as Exhibit "R," which is done accordingly.

(Objected to by respondent's solicitor on the ground that the same is immaterial.)

And thereupon the said complainant offered in evidence a deed made by Gilbert C. Monell and wife to Aaron Root, dated January 31, A. D. 1861, and requested that the same be attached to this deposition as Exhibit "S," which is done accordingly.

(Objected to by respondent's solicitor on the ground that the same is immaterial.)

And thereupon the said complainant offered in evidence a deed made by Gilbert C. Monell and wife to Aaron Root, dated Jan. 31, A. D. 1861, and requested that the same be attached to this deposition as Exhibit "F," which is done accordingly.

(Objected to by respondent's solicitor on the ground that the same is immaterial.)

266 And thereupon the said complainant offered in evidence a certified copy of a recorded plat of North Omaha filed for record November 19th, A. D. 1860, and requested that the same be attached to this depsition as Exhibit "U," which is done accordingly.

(Objected to by sol. for respondents, on the ground that the same is immaterial.)

And therenpon the said complainant offered in evidence a certified copy from the records of the General Land Office at Washington city of the papers in the case of Robert Shields against the town of Omaha, et al., the certificate dated June 28, 1860, and requested that the same be attached to this deposition as Exhibit "V."

To the introduction of which and every paper and exhibit therein contained, and to each of them, the solicitor for respondents objects, on the ground that they and each of them are immaterial, irrelevant and secondary evidence, and wholly incompetent, and thereupon the said certified copy is hereto attached marked Exhibit "V."

The paper above refered to as Exhibit "V," being too voluminous to be attached to this deposition, is returned into court marked by me as Exhibit "V," and filed with this report.

GEORGE W. DOANE,
Special Master.

267 THE TERRITORY OF NEBRASKA, *Douglas County, ss:*

I, George W. Doane, special master in chancery, duly appointed to take the testimony and proof in the foregoing cause, do hereby certify that the above-named Lorin Miller, William R. Demarest, John T. Baldwin, Jefferson P. Cassady, James D. Test, John I. Redick, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing depositions by them subscribed were reduced to writing by me and written in the presence of said witnesses respectively, and by them respectively subscribed at the time of taking the same in my presence and in the presence of the said solicitors of the said parties in attendance as above stated, and were taken at my office, in the city of Omaha, in said county, beginning on he 16th day of May, A. D. 1865, by consent of the parties, and continued on the 5th and 6th days of October, A. D. 1865, by consent of parties, and that the balance of the testimony herein was taken by consent of parties at the office of Messrs. Redick & Briggs, in the city of Omaha, on the 15th day of October, A. D. 1866.

In testimony whereof I have hereunto set my hand this 1st day of November, A. D. 1866.

GEORGE W. DOANE,
Special Master.

Master's fees.

Swearing 6 witnesses	60
Taking testimony	17 82
Certificate	25
Report	5 00
Total	$23 67

268 *Exhibit "O."*

This indenture, made this twenty-third day of November, in the year one thousand eight hundred and fifty-seven, between Robert Shields and Margret J., his wife, of the city of Omaha, in the county of Douglas and Territory of Nebraska, of the first part, and James D. Test, of the second part, witnesseth: That the said parties of the first part, in consideration of the sum of ten thousand dollars, to them duly paid before the delivery hereof, have granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey to the said party of the second part, his heirs and assigns, forever, all the undivided one-half of the west half of the southwest quarter of section number ten, (10,) and the north half of the northwest quarter of section number fifteen, (15,) in township number fifteen (15) north of range number thirteen (13) east of the 6th principal meridian, in Nebraska Territory, with the appurtenances and all the estates, title, and interest, of the said parties of the first part therein; and the said parties of the first part do hereby covenant and agree with the said party of the second part, that they are the lawful owners of

the premises above granted, seized thereof in fee simple absolute; that they will warrant and defend the above-granted premises in the quiet and peaceable possession of the said party of the second
269 part, and his heirs and assigns, forever; and that they are free from all encumbrance whatsoever.

In witness whereof the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

[L. S.] ROBERT SHIELDS.
[L. S.] MARGRET J. SHIELDS.

Signed, sealed, and delivered in presence of—
JAS. M. WOOLWORTH.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

I, James M. Woolworth, a notary public in and for said county and Territory aforesaid, do hereby certify that Robert Shields and Margret J., personally known to me as the same persons whose names are subscribed to the above, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing, as their free and voluntary act, for the uses and purposes therein set forth; and the said Margret J., wife of the said Robert Shields, having been by me examined, separate and apart, and out of hearing of her said husband, and the contents and meaning of the said instrument of writing having been by me made known to her, acknowledged that she freely and voluntary executed
270 the same, and relinquished her dower of the lands and tennaments therein mentioned, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and seal, this twenty-third day of November, A. D. 1857.

JAMES M. WOOLWORTH,
Notary Public.

Rec'd for record Nov. 23d, 1857, at 10½ o'clock a. m., and recorded in Book I, page 406.

THOMAS O'CONNER,
Co. Reg'r.

271 *Exhibit "P."*

Know all men by these presents, that we, James D. Test and Alice Jane Test, of the county of Pottawattamie and State of Iowa, the consideration of the sum of one hundred dollars, to us in hand paid, do hereby quit-claim to Jefferson P. Cassady, of said county and State, all our right, title, and interest to the following described premises, to wit:

The undivided one-eighth part, ($\frac{1}{8}$) of the west half of the southeast qr. of section No. ten, (10,) and the north half of the northwest qr. of section No. fifteen, (15,) in township No. fifteen (15) north of range No. thirteen (13) west, situated in the county of Douglas and Territory of Nebraska.

In witness whereof we have hereunto set our hands and seals, this eighth day of January, A. D. 1858.

JAMES D. TEST.
ALICE JANE TEST.

In presence of—
JOHN T. STEWART.

STATE OF IOWA, *Pottawattamee Co., ss:*

I, John T. S. Stewart, a notary public, in and for the county and State aforesaid, do hereby certify that James D. Test and Alice Jane Test, personally known to me as the same persons whose names are subscribed to the above deed, appeared before me this day, in
272 person, and acknowledged they signed, sealed, and delivered the said instrument of writing as their voluntary act and deed, for the uses and purposes therein set forth; and the said Alice Jane, wife of the said James D. Test, having been examined by me, seperate and apart from her said husband and out of his hearing, and the contents and meaning of the said instrument of writing having been by me made known to her, acknowledged that she freely and voluntary executed the same, and relinquished her dower to the lands and tenements therein mentioned, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and seal, this 8th day of January, A. D. 1858.

[SEAL.] J. T. S. STEWART,
Notary Public, Pottawattamie Co., Iowa.

STATE OF IOWA, *Pottawattamee Co., ss*:

I. C. P. Kellogg, clerk of the District Court in and for said county and State, do J. T. S. Stewart, whose signature appears to the above acknowledgement, was, at the time of taking said acknowledgement, and still is, a notary public, in and for said county and State, duly commissioned and qualified, and to all his official acts full
273 faith and credit are due and ought to be given; I further certify that the signature of said J. T. S. Stewart to the above acknowledgement is genuine, and that said acknowledgement is certified according to the laws of the State of Iowa.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of said court, at Council Bluffs city, in said county, on this 16th day of January, A. D. 185 .

C. P. KELLOGG. *Clerk D. C.*
Per JOHN W. BLAKE, *Deputy.*

Received for record Jan. 16, 1858, at 11 o'c. a m., and recorded in Book I, page 509.

THOMAS O'CONNOR,
Co. Reg'r.

274 *Exhibit "Q."*

For the consideration of five thousand dollars, we hereby sell and convey to John P. Baldwin and G. M. Dodge, of Pottawattamie county, Iowa, the following described tract of land, situated in the county of Douglas, Territory of Nebraska, to wit: The undivided one-fourth (¼) of the west half of the southwest qr. of section ten, (10,) and the north half of the northwest qr. of section fifteen, (15,) in township No. fifteen, (15,) range 13 E., and the undivided one-half (½) of lots six, (6,) seven, (7,) eight, (8,) nine, (9,) ten, (10,) eleven, (11,) twelve, (12,) thirteen, (13,) fourteen, (14,) fifteen, (15,) in block one hundred and twenty-eight and one-half (128½) in N. ½ of N. W. ¼ of sec. 15, town. 15, range 13 E., Omaha City, Nebraska, and warrant the title to the said premises against all persons whatsoever, lawfully claiming or to claim the same, from, by, or through.

In testimony whereof we hereunto attach our hands, this 15th day of December, A. D. 1857.

JAMES D. TEST.
ALICE JANE TEST.

THE STATE OF IOWA, *Pottawattamie County, ss*:

On this fifteenth day of December, A. D. 1857, before me, a notary public in and for said county and State aforesaid, personally
275 appeared James D. Test, Allice Jane Test, personally known to me to be the identical persons who executed the above deed of conveyance, and acknowledged the execution of the same to be their voluntary act and deed, for the uses and purposes therein expressed.

In witness whereof I hereunto attach my hand and seal notarial, this 15th day of December, A. D. 1857.

[SEAL.] J. S. STEWART,
Notary Public.

Received for record December 25th, 1857, at 12½ o'c. p. m., and recorded in Book I, page 410.

THOMAS O'CONNER,
Co. Register.

276 *Exhibit "R."*

In consideration of the sum of three dollars to us paid, the receipt whereof is hereby acknowledged, we, Gilbert C. Monell and Lucinda Monnell, of the county of Douglas and Territory of Nebraska, do hereby sell and convey to Aaron Root, of the county of Douglas and Territory of Nebraska, the following described real estate, to wit: Lots Nos. 1, 2, 3, 4, 5, and 6, in block No. 3, of North Omaha plat No. 1, as recorded in the office of the register of deeds for Douglas, N. T., November 19th, 1860; and we do hereby covenant with the said Aaron Root, that we are lawfully seized of said premises; that they are free from encumbrance, and do hereby covenant to warrant and

defend the said premises against the lawful claims of all person, whomsoever claiming through us.

Witness our hands, this 20th day of Nov., A. D. 1860.

GILBERT C. MONELL.
LUCINDA MONELL.

In presence of—
J. R. MEREDITH.

TERRITORY OF NEBRASKA, *Douglas County, ss*:

On this twentieth day of November, A. D. 1860, before me, a notary public in and for said county, appeared the above-named
277 Gilbert C. Monell, and Lucinda, his wife, personally known to me to be the identical persons whose names are affixed to the above instruments, grantors, and acknowledged the same to be their voluntary act and deed.

Witness my hand and notarial seal, the day and year aforesaid.

[SEAL.] JOHN R. MEREDITH,
Notary Public.

Received for record the 11th day of December, A. D. 1861, at 2 o'clock p. m., and recorded in Book "O" of deeds, page 36. Transfer dated Dec. 11, 1861.

P. HUGUS,
Co. Clerk & Register.

278 *Exhibit "S."*

Know all men by these presents, that we, Gilbert C. Monel and Lucinda Monel, his wife, of Omaha, Nebraska, in consideration of nineteen hundred and eighty dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto Aaron Root, of Omaha, Nebraska, and to his heirs and assigns, the following described real estate situated in the county of Douglas, and Territory of Nebraska, to wit, out lots number'g eleven, (11,) twelve, (12,) thirteen, (13,) fourteen, (14,) and fifteen, (15,) in North Omaha plat No. one, as recorded in the office of the register of deeds for Douglas county, N. T., Nov. 19th, 1860; and we do hereby covenant with the said Aaron Root, and his heirs and assigns, that we are lawfully seized of said premises, that they are free from encumbrance, that we have good right and lawful authority to sell the same, and we do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whatsoever claiming through us. And the said Lucinda Monel hereby relinquishes all her right of dower in and to the above-described premises.

Signed this thirty-first day of January, A. D. 1861.

GILBERT C. MONELL.
LUCINDA MONELL.

In presence of—
BYRON REED.

279 TERRITORY OF NEBRASKA, *Douglas County*:

On this thirty-first day of January, A. D. 1861, before me, a notary public in and for said county, personally came Gilbert C. Monell and Lucinda Monell, his wife, personally to me known to be the identical persons whose names are affixed to the above deed as grantors, and acknowledged the instrument to be their voluntary act and deed.

[SEAL.] BYRON REED,
Notary Public.

280 *Exhibit "T."*

Know all men by these presents, that we, Gilbert C. Monell and Lucinda Monell, his wife, of Omaha, N. T., in consideration of four 50.100 dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto Aaron Root, of the the same place, the following described real estate situated in the county of Douglass, and Territory of Nebraska, to wit, lots 7, 8, 9, 10 and 11 in block No. 3 of North Omaha, plat No. 1, as recorded in the office of the register of deeds for Douglass county, N. T., November 19, 1860, and we do hereby covenant with the said Aaron Root, and his heirs and assigns, that we are lawfully seized of said premises, that they are free from encumbrance, that we have good right and lawful authority to sell the same, and we do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever claiming through us; and the said Lucinda Monell hereby relinquishes all her right of dower in and to the above described premises.

Signed this thirty-first day of January, A. D. 1861.

GILBERT C. MONELL.
LUCINDA MONELL.

In presence of—
BYRON REED.

281 TERRITORY OF NEBRASKA, *Douglas County*:

On this fourteenth day of May, A. D. 1861, before me, a notary public in and for said county, personally came Gilbert C. Monell and Lucinda Monell, his wife, personally to me known to be the identical persons whose names are affixed to the above deed as grantors, and acknowledged the instrument to be their voluntary act and deed.

[SEAL.] BYRON REED,
Notary Public.

282 THE TERRITORY OF NEBRASKA,
Douglas County, Clerk's Office, ss:

I, Frank Murphy, county clerk in and for said county, and ex-officio register of deeds, do certify that the within plat of map of North Omaha is a true and correct copy from the original now on file in my office and of the endorsements thereon.

In witness whereof I have hereunto set my hand and affixed the seal of said office this 20th day of April, anno Domino 1866.

[SEAL.] FRANK MURPHY,
County Clerk and ex-officio Register of Deeds.

(Here follows map, marked page 282.)

OMAHA, NEBRASKA, *Nov. 15th, A. D.* 1860.

The description of my lands, as shown by this plat, is made with my full consent and in accordance with my desire, and hereby the purpose of public highway dedicate to the public the streets herein dedicated.

GILBERT C. MONELL.

In presence of—
F. DAVIS.
GEO. I. GILBERT.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

Be it remembered, that on this fifteenth day of November, A. D. eighteen hundred and sixty, before me, a justice of the peace in and for said county, in person came Gilbert C. Monell, to me well and personally known to be the identical person whose name is subscribed to the above statement and dedication, and acknowledged the same to be his voluntary act and deed.

In witness whereof I have hereunto set my hand the day and year aforesaid.

GEORGE I. GILBERT,
Justice of the Peace.

283 And afterwards there was, on the 3d day of November, A. D. 1866, there was entered on the journal record of said court a final decree in this cause, in the words and figures as follows, to wit:

At a District Court in chancery, at the court-house in the city of Omaha, for the county of Douglas, on the 3d day of November, A. D. 1866.

Present: The Honorable William Kellogg, judge.

AARON ROOT, complainant,
vs.
ROBERT SHIELDS, JAMES D. TEST, JEFFERSON P. CASSADY, JOHN T. BALDWIN, GRENVILLE M. DODGE, NATHAN P. DODGE, EVERT V. SMITH, ELRICK SMITH, JAMES WOODS, WILLIAM P. CRISTY, ROBERT K. WOODS, WILLIAM GENTRY, JOSEPH WOODS, jr., HELFEENSTEIN, GORE AND CO., impleaded with GEORGE M. MILLS, GILBERT C. MONELL, MEGATH, RICHARDS & CO., and the city of Omaha, defendants.

This cause came on to be heard upon the pleadings, proofs, and exhibits filed therein, and was argued by Mr. Woolworth for the complainant, and by Messrs. Redick & Briggs for the defend-
284 ants; and it appearing to the court that the said Shields has failed to appear to the said complainant's bill of complaint, it is ordered that the same be, and is hereby, taken as confessed, and

the court doth find that the several deeds of conveyance, whereby the defendants, Cassady, Test, Baldwin, Dodge, Dodge, and Smith, claim to be interested in the premises in question, were made by said Shields after he had entered the premises at the United States Land Office, under and by virtue of the act of Congress, in the pleadings mentioned, and before the letters patent therein mentioned were issued to the said Shields; and the court also finds that the said entry of said lands was unauthorized by said act of Congress. It is therefore now here declared by this court, that the said deeds so as aforesaid made by said Shields were null and void, and did not nor do pass to the said defendants, Cassady, Test, Baldwin, Dodge, Dodge, and Smith, any right, title, or interest in the premises in question. Wherefore it is now ordered, adjudged, and decreed by this court, that the said bill of complaint be, and the same is hereby, dismissed as to all of the defendants except said Shields; and it is also now here declared, that under and by virtue of the letters patent in the said bill mentioned, the said Shields now holds the
285 legal title to the premises in question in this cause, in trust for said complainant. Whereupon it is ordered, adjudged, and decreed, that within ten days from the date of this decree, the said Robert Shields make, execute, and deliver to the said complainant a deed, in due form of law, duly acknowledged, and thereby convey said premises to said complainant, and in default of his, the said Shields, making said deed within the time in that behalf above limited, that George C. Hopkins, one of the masters of this court, make such deed for and in behalf of said Robert Shields; and it is further ordered that the said complainant have and recover against said Shields the costs of this suit to be taxed, and that the other defendants herein recover against said complainant their costs, to be taxed. The premises to be affected by this decree, and to be so as aforesaid conveyed, are described as follows; that is to say, lots one, two, three, four, five, six, seven, eight, nine, ten, and eleven, in block number three, in the plat of North Omaha, No. 1, and out-lots eleven, twelve, thirteen, and fourteen, and fifteen, in the plat of North Omaha, No. 1.

WM. KELLOGG.

Endorsed: Filed Nov. 3d, 1866. Wm. Kellogg, jr., clerk.

286 And thereupon, afterwards, to wit, on the 17th day of November, A. D. 1866, was filed in this cause, by the defendants, a notice of appeal, in words and figures following, to wit:

In District Court, Douglas county, in chancery.

AARON ROOT, complainant,
vs.
ROBERT SHIELDS *et al.*, defendants.

And now comes Cassady, Test, Dodge, and Baldwin, defendants, and hereby give notice to said complainant, Aaron Root, that they

and each of them have appealed, and do hereby appeal, from the final decree rendered in this cause, at the October term of said court, A. D. 1866, to the Supreme Court of the Territory of Nebraska, and that in due time they will file a transcript in such last-named court, and take proper steps to have such appeal perfected.

REDICK & BRIGGS,
Solicitors for Cassady, Test, Baldwin and Dodge.

287 STATE OF NEBRASKA, *County of Douglas, ss:*

I, George Armstrong, clerk of the District Court of the first judicial district, within and for the county of Douglas, State of Nebraska, do hereby certify that the foregoing transcript is a true and faithful copy of all the proceedings had in the abovee-ntitled cause, and remaining of record in this office.

Witness my hand and the seal of said court this fifteenth day of May, A. D. 1867.

[SEAL.] GEORGE ARMSTRONG, *Register.*

Endorsed: No. 169. Aaron Root *vs.* Robert Shields *et al.* There being no clerk of the Supreme Court, this record was presented to me as one of the justices of the Supreme Court, to be filed, which is done this 15th day of May, 1867. Geo. B. Lake, associate justice Supreme Court.

288 DEPARTMENT OF THE INTERIOR,
General Land Office, June 26, 1865.

I, Jos. S. Wilson, Act'g Commissioner of the General Land Office, do hereby certify that the annexed copies of papers in the case of Robert Shields *vs.* The town of Omaha *et al.*, Omaha land district, Nebraska T'y, are true and literal exemplifications from the records and files of this office, and that the interlineations and erasures, as shown in the lines of page 1, 25, 26, 27; p. 2, 37 and 38; p. 3, 40 and 41; p. 4, 10, 43, and 45; p. 5, 9 and 10; p. 13, 12 and 19; p. 18, 17; p. 28, 7; p. 32, 20; p. 63, 16; p. 65, 20; p. 67, 7; p. 78, 12; p. 79, 1 and 3; p. 92, 21; p. 93, 4; p. 98, 20; p. 119, 17; p. 131, 8, 12, 16, and 17, 21; p. 133, 12, 13 and 24; p. 134, 5; p. 135, 24; p. 136, 6 and 7; p. 137, 2; p. 139, 28, 4, 5, 6, 24, 25, and 26; p. 140, 17, 10, and 11; p. 141, 24; p. 142, 15; p. 143, 6; 145, 5, 17, 6, and 22; p. 148, 4; p. 153, 28; p. 154, 1, 2, 3, 18, 19 and 28; p. 155, 1; p. 156, 12; p. 158, 23 and 25; p. 159, 7; p. 165, 9; p. 166, 10, 15, 16, and 17; p. 170, 4; p. 173, 23, 24, and 25, exist in the original.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] JOS. S. WILSON,
Act'g Commissioner of the General Land Office.

Endorsed: Filed Nov. 1, 1866. W. Kellogg, jr., cl'k.

289 *Shields to Beeson.*

In consideration of the sum of one thousand one hundred dollars to me paid, the receipt whereof is hereby acknowledged, I, Robert Shields, of Omaha, Nebraska, hereby quit claim to John Beeson, of the same place, the following described property, situated in the county of Douglas, and Territory of Nebraska, being lots Nos. six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, and fifteen, (6, 7, 8, 9, 10, 11, 12, 13, 14, and 15,) in block No. one hundred and twenty-eight and a half, (128½,) in the addition of the Omaha City Co. to Omaha city, together with the dwelling-house thereon, and I hereby agree to warrant the said premises against persons whomsoever except the government of the United States.

Witness my hand this 24th day of June, A. D. 1856.

R. SHIELDS.

I certify that the above is a correct copy of a certain conveyance from Shields to Beeson, recorded in the records of Douglas county, N. T.

THOMAS O'CONNOR,
Register of Deeds, Douglas Co., N. T.

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, J. W. Paddock, clerk of the District Court in and for said county, do hereby certify that the annexed instrument is executed and proved or acknowledged in due form, and according to the laws of the Territory of Nebraska, to entitle it to be recorded therein; also, that Thomas O'Connor, whose certificate is thereto attached, was, at the time of making such certificate, a register of deeds in and for said county, and qualified and authorized to take the same. And I further certify that I am well acquainted with the handwriting
290 of the said Thomas O'Connor, and verily believe the signature to said certificate to be genuine.

Witness my hand and the seal of said court at Omaha, this 11th day of May, A. D. 1858.

J. W. PADDOCK, *Clerk.*
By E. B. CHANDLER, *Deputy.*

[SEAL FIRST DISTRICT COURT OF NEBRASKA.]

Endorsed: Page 1. Deed F. June 23, 1858. Examined. Shields to Beeson.

Omaha City Co. to R. Shields.

For a valuable consideration, the receipt of which is hereby acknowledged, the Omaha City Co. do hereby quit claim, grant, sell, convey and confirm unto R. Shields, of Omaha City, Nebraska Territory, and to his heirs and assigns forever, the following named lots in Omaha City, (being a portion of the lots distributed Sept. 4th, 1855, and first lithographed in the new map, issued August, 1855.) Lots Nos. 6, 7, 8, 9 and 10, in block No. 46½; lots Nos. 1, 2 and 3, in

block No. 22½ ; lots Nos. 1 and 2, in block No. 58½ ; lots Nos. 6, 8, 9 and 10, in block No. 128½ ; lots 1, 2 and 3 in block No. 59½ ; lots Nos. 2 and 3 in block No. 189½, to have and to hold the foregoing described premises unto the said R. Shields, and to his heirs and assigns forever.

In testimony whereof I have hereunto set my hand and seal this 16th day October, A. D. 1855.

[L. S.] J. M. PALMER, *Pres't of Co.*

Signed, sealed and delivered in presence of Geo. Armstrong.

291 Rec. for record and recorded June 25, 1856, at 9 a. m.
T. O'CONNOR, *Reg.*
By L. RICHARDSON, *Dept.*

I certify that the above is a correct copy of a certain conveyance from the Omaha City Company to R. Shields, recorded on the records of Douglas county, Nebraska Territory.

Omaha, N. T., May 10, 1858.

THOMAS O'CONNOR,
Register of Deeds, Douglas County, N. T.

TERRITORY OF NEBRASKA, *County of Douglas, ss :*

I, J. W. Paddock, clerk of the District Court, in and for said county, do hereby certify that the annexed instrument is executed and proved or acknowledged in due form, according to the laws of the Territory of Nebraska, to entitle it to be recorded therein. Also, that Thomas O'Connor, whose certificate is thereto attached, was, at the time of making such certificate, a register of deeds in and for said county, duly qualified and authorized to take the same, and I further certify that I am acquainted with the handwriting of the said Thomas O'Connor, and verily believe the signature to the said certificate is genuine.

Witness my hand and the seal of said court, at Omaha, this 11th day of May, A. D. 1858.

J. W. PADDOCK, *Clerk.*
By E. B. CHANDLER, *Deputy.*

[SEAL FIRST DISTRICT COURT OF NEBRASKA.]

Endorsed : Deed, Omaha City to Shields. Examined, June 23, 1858. B.

292 *Shields to Baldwin.*

This indenture, made this 2d day of December, in the year of our Lord one thousand eight hundred and fifty-seven, between Robert Shields and Margret J. Shields, of the county of Douglas and Territory of Nebraska, of the first part, and John T. Baldwin, of the county of Pottawattamie, of the second part, witnesseth, that in consideration of the sum of one thousand dollars to us in hand paid, by the party of the second part, the receipt of which is hereby acknowledged,

the said parties of the first part have sold, and by these presents do grant and convey unto the said party of the second part, his heirs and assigns forever, all the certain piece or parcel of land situated in the city of Omaha, in the county and Territory aforesaid, and described as follows, to wit: The undivided half (½) of lots number six (6) and seven, (7,) eight, (8,) nine, (9,) ten, (10,) eleven, (11,) twelve, (12,) thirteen (13,) fourteen, (14,) and fifteen, (15,) in block No. one hundred and twenty-eight, ½ in the north half of the northwest quarter of section fifteen, (15,) township No. 15, (fifteen,) range No. thirteen, (13,) and in the city of Omaha, Douglas county, Nebraska Territory, to have and to hold the above-described premises, with the appurte-

293 nances, and all the estate, right, title and interest of the parties of the first part unto the said party of the second part, his heirs and assigns forever, and the said parties of the first part, for themselves and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person or persons lawfully claiming or to claim the same, by, from or under the said parties of the first part, shall warrant, and by these presents forever defend.

In witness whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

[L. S.] ROBERT SHIELDS.
[L. S.] MARGRET J. SHIELDS.

Sealed, signed and delivered in presence of—

TERRITORY OF NEBRASKA, *County of Douglass, ss*:

On this 2d day of December, A. D. 1857, before me, Alfred Sayer, a notary public in and for said county and Territory, personally appeared Robert Shields and Margret J. Shields, to me known to be the identical persons whose names are affixed to the above instrument as grantors, and acknowledged the same to be their voluntary act and deed.

In witness whereof, I have hereunto set my hand and official seal, the day and year above written.

[SEAL.] ALFRED SAYER, *Notary Public.*

Filed and recorded Dec. 2, 1857, at 3 o'clock p. m.
Attest: THOMAS O'CONNOR, *Register.*

294 I certify that the foregoing is a correct copy of a certain conveyance from Shields to Baldwin, recorded on the records of Douglas county, Nebraska Territory.

Omaha, N. T., May 10th, 1858.

THOMAS O'CONNOR,
Register of Deeds, Douglas Co., N. T.

TERRITORY OF NEBRASKA, *County of Douglas, ss*:

I, J. W. Paddock, clerk of the District Court in and for said county, do hereby certify that the annexed instrument is executed and proved or acknowledged in due form according to the laws of the Territory of Nebraska, to entitle it to be recorded therein. Also, that Thomas O'Connor, whose certificate is thereto attached, was, at the time of making such certificate, a register of deeds in and for said county, duly qualified and authorized to take the same. And I further certify that I am well acquainted with the handwriting of the said Thomas O'Connor, and verily believe the signature to the said certificate is genuine.

Witness my hand and the seal of said court, at Omaha, this 11th day of May, 1858.

J. W. PADDOCK, *Clerk.*
By E. B. CHANDLER, *Deputy.*

[SEAL FIRST DISTRICT COURT OF NEBRASKA.]

Endorsed: Examined: Deed, Shields to Baldwin. "C." June 28, 1858.

295 *Shields to Test.*

This indenture, made this twenty-third day of November, in the year one thousand eight hundred and fifty-seven, between Robert Shields and Margret J., his wife, of the city of Omaha, in the county of Douglas and Territory of Nebraska, of the first part, and James D. Test, of the second part, witnesseth, that the said parties of the first part, in consideration of the sum of ten thousand dollars, to them in hand paid before the delivery of these presents, do grant, bargain, and sell and convey to the said party of the second part, his heirs and assigns, forever, all the undivided one-half of the west half of the southwest quarter of section No. ten, (10,) and the north half of the northwest quarter of section fifteen, (15,) in township No. fifteen (15) north of range thirteen (13) east of the 6th principal merridian, in Nebraska Territory, with the appurtenances and all the estate, title, and interest of the said parties of the first part therein. And the said parties of the first part do hereby covenant and agree with the said party of the second part that they are the lawful owners of the premises above granted and seized thereof in fee simple, absolute, that they will warrant and defend the above-granted premises in the quiet and peaceable possession of the said party of the second part and his heirs and assigns, forever, and that they are free from all incumbrance
296 whatever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

[SEAL.] ROBERT SHIELDS.
[SEAL.] MARGRET SHIELDS.

Sealed, signed, and delivered in presence of—
JAS. M. WOOLWORTH.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

I, James M. Woolworth, a notary public in and for said county and Territory aforesaid, do hereby certify that Robert Shields and Margret J., personally known to me as the same persons whose names are subscribed to the above deed, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth. And the said Margret J., wife of the said Robert Shields, having been by me examined separate and apart, and out of hearing of her said husband, and the contents and meaning of the said instrument of writing having been by me made known to her, acknowledged that she freely and voluntarily executed the same and relinquished her dower to the lands and tenements therein mentioned, without compulsion of her said husband, and that she does not wish to retract the same.

297 Given under my hand and seal this twenty-third day of November, A. D. 1857.

[SEAL.] JAS. M. WOOLWORTH,
Notary Public.

Filed and recorded Nov. 23, 1857, at 11½ a. m.
Attest:
THOMAS O'CONNOR, *Register.*

I certify that the foregoing is a correct copy of a certain conveyance from Shields to Test, recorded on the records of Douglas county, N. T.

Omaha, N. T., May 10, 1858.
[SEAL.] THOMAS O'CONNOR,
Register of Deeds.

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, J. W. Paddock, clerk of the District Court in and for said county, do hereby certify that the annexed instrument is executed and proved or acknowledged in due form, according to the laws of the Territory of Nebraska, to entitle it to be recorded therein. Also, that Thomas O'Connor, whose certificate is thereto attached, was at the time of making such certificate a register of deeds in and for said county, duly qualified and authorized to take the same. And I further certify that I am well acquainted with the handwriting of the said Thomas O'Connor, and verily believe the signature to the said certificate is genuine.

Witness my hand and the seal of said court, at Omaha, this 11th day of May, A. D. 1858.

J. W. PADDOCK, *Clerk.*
By E. B. CHANDLER, *Deputy.*

[SEAL FIRST DISTRICT COURT OF NEBRASKA.]

Endorsed: Deed, Shields to Test. (D.) Examined June 23, 1858.

298 *Mttchell to Shields.*

In consideration of the sum of thirty dollars to me paid, the receipt whereof is hereby acknowledged, I hereby quit claim to Robert Shields, of Omaha City, the following described premises, situated in the county of Douglas and Territory of Nebraska: Lot No. two (2) in block 145 in Omaha City, as surveyed by A. D. Jones and lithographed by the Council Bluffs and Nebraska Ferry Company; also, lots Nos. 11, 12, 13, 14, and 15 in block 128½ in Omaha City Company's addition to Omaha City.

Witness my hand and seal this fifteenth day of October, A. D. 1856.

[SEAL.] JAMES C. MITCHELL.

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

On this fifteenth day of October, A. D. 1856, before me, a notary public in and for said county, personally appeared James C. Mitchell, kno'w to me to be the identical person whose name is affixed to the above instrument as grantor, and acknowledged the same to be his free and voluntary act and deed.

A. J. POPPLETON,
Notary Public, Douglas Co., N. T.

Received for record and recorded April 3, 1856, at 2 a. m.
Attest:

THOMAS O'CONNOR, *Reg.*

299 I hereby certify that the above is a correct copy of a certain conveyance from Mitchell to Shields, as recorded on the records of Douglas county, Nebraska Territory.

Omaha, N. T., May 10, 1858.

THOMAS O'CONNOR,
Register of Deeds.

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, J. W. Paddock, clerk of the District Court in and for said county, do hereby certify that the annexed instrument is executed and proved or acknowledged in due form, according to the laws of the Territory of Nebraska, to entitle it to be recorded. Also, that Thomas O'Connor, whose certificate is thereto attached, was at the time of making such certificate a register of deeds in and for said county, duly qualified and authorized to take the same. And I further certify that I am well acquainted with the handwriting of the said Thomas O'Connor, and verily believe the signature to the said certificate is genuine.

Witness my hand and the seal of said court, at Omaha, this 11th day of May, A. D. 1858.

[SEAL.] J. W. PADDOCK, *Clerk.*
By E. B. CHANDLER, *Deputy.*

Endorsed: Deed, Mitchell to Shields, "E." Examined June 28, 1858.

300 WASHINGTON, D. C., *March* 20, 1862.

Hon. J. M. Edmunds, Com'r Gen. Land Office:

SIR: I have received your letter of 15th inst., notifying me as "att'y for G. C. Monell, in the pre-emption case of Robert Shields," that I am allowed 30 days from the date of your letter to file my argument as per communication of 24th January. I shall file my argument before the expiration of the time specified. I am at present awaiting the receipt of evidence from Omaha.

Very respectfully, your ob't s'v't,

R. T. MORSELL.

Endorsed: F. 96133. R. T. Morsell, Washington, March 20, 1862. Will soon file his argument in the case of Robert Shields. No answer required. Gray. R. 1, 173; pre. div. Recorded at the General Land Office Mar. 21, 1862.

301 WASHINGTON, D. C., *Feb.* 1*st*, 1862.

Hon. J. M. Edmunds, Com'r Gen'l Land Office:

SIR: Yours of the 28th ult. informs us that an application was made to the Sec'y of the Interior by Morsell, esq., in favor of one Morrell, who desires to file an argument in the Shields pre-emption case, (which has been in contest for the past five or six years, and argued and re-argued by the parties,) "showing the fraudulent character of Shields' claim and the justice of his own;" and that on the 25th ult. the Secretary has made an order directing that the issue of the patent be suspended for the present.

We will be pleased to be informed of the fact when the said argument shall have been filed.

We have the honor to be your ob't serv't,

BIGGER & SHERMAN.

Endorsed: F. 92743. Bigger & Sherman; Feb. 1, 1862. Wish to be informed when the argument in the Shields pre-emption case is filed. Ans. 15 March, 1862. Gray. R. 1, 139; pre. div. Received at the Gen'l Land Office, Washington, Feb. 3, 1862.

302 LAND OFFICE, OMAHA, *November* 21*st*, 1867.

In the matter of the right of Robert Shields to pre-empt the north half the N west quarter of section fifteen, (15,) and the west half of the south W $\frac{1}{4}$ of section No. 10, in township No. 15 N of range 15 east, claimant appeared with his witness, George W. Hepburn, who being duly sworn, deposes and says: I am well acquainted with Robert Shields, who is a citizen of the United States, and the head of a family consisting of a wife and two children. Claimant, on or about the 15th day of April, A. D. 1856, commenced his settlement by laying a foundation for a dwelling house. Since then he completed said house, into which he moved about the 1st day of September, 1857, and has been living there ever since, and is living there at the present time, and is making it his home. Claimant's

house is a frame, 16 feet by 24, enclosed with pine lumber, is one and a half storys high, with shingle roof and board floors, has eleven windows with sash and glass, three outside and six inside, partition doors, one chimney and two stoves and cooking utensils; also beds and bedding, chairs, tables, carpets, and a variety of articles necessary for housekeeping. Claimant has a well, stable, and other necessary out buildings on said premises, also about two acres enclosed with fence and under cultivation. Claimant resided on gov-
303 ernment land when he made his settlement; think he does not own 320 acres of land in any State or Territory.

GEORGE W. HEPBURN.

Sworn and subscribed to before me, this 21st day of November, A. D. 1857.

JOHN A. PARKER, *Register.*

No. 4,521. LAND OFFICE, OMAHA, N. T., *July* 16, 1857.

I certify that Robert Shields has this day filed in my office, under the pre-emption law of 1841, for the SE. quarter ($\frac{1}{4}$) of section number 10, in township number 13, in range number 10 east of the 6th principal merridian, in Nebraska Territory.

JOHN A. PARKER, *Register.*

Declaratory statement where the land is not subject to private entry.

I, Robert Shields, of Sarpay county, N. T., being a citizen of the United States, and the head of a family, have, on the 10th day of April, A. D. 1857, settled upon and improved the southeast quarter of section No. 10, in township No. 13 north of range number 10 east 6th principal merridian, in the district of lands subject to sale at the land office at Omaha, Nebraska Territory, and containing one hundred and sixty arces, which land has not yet been offered
304 at public sale, and thus rendered subject to private entry, and I do hereby declare my intention to claim said land as a pre-emption right under the provisions of the act of Congress of 4th September, 1841.

Given under my hand this 16th day of July, A. D. 1857.

ROBERT SHIELDS.

In presence of—
IRA A. W. BUCK.

I have made a mistake, and hereby authorize and request the same to be withdrawn.

R. SHIELDS.

No. 4,521. UNITED STATES LAND OFFICE, OMAHA, N. T., *March* 19, 1862.

I, Edward B. Taylor, register of the United States land office, at Omaha, Nebraska, hereby certify that the within is a copy of the

declaratory statement of Robert Shields, filed at the date thereof, upon the land therein described, as appears from the original on file in this office.

EDWARD B. TAYLOR, *Register.*

305 GENERAL LAND OFFICE, *September* 20, 1858.

Hon. Finlay Rigger, present:

SIR: In pursuance of your personal application of the 14th inst. I herewith enclose you a copy of the official letter of the receiver at Omaha, under date of June 5th, 1858, in relation to the claim by pre-emption of James Shields to the W. ½ of the SW. ¼ of sec. 10, and the NW. ¼ of sec. No. 15, T. 15 N., R. 13 east, in Omaha district, N. T.

Very respectfully yours,

JOS. S. WILSON,
Acting Com'r.

[Examined.]

306 *Receivers' decision.*

UNITED STATES LAND OFFICE,
OMAHA, N. T., *June 5th*, 1858.

Hon. Thomas A. Hendricks, Commissioner Gen'l Land Office, Washington city, D. C.:

SIR: Herewith we transmit all the papers connected with the investigation of the entry of Robert Shields to the W. ½ of the SW. ¼ of sec. 10, and the N. ½ of the NW. ¼ of sec. 15 town. 15 N., range 13 E., made Nov. 21st, 1857. This tract is shown by the testimony of W. N. Byers, Lorin Miller, and Chauncey Wiltse, to have been surveyed into lots, blocks, streets and alleys in 1856, and during that year was lithographed, and a map or plat of the same published, and that the lines then established have been regarded in all plats published, and transfers of portions of the tract up to and since the time of entry. The city of Omaha have made no improvements on this tract in their corporate capacity, the surveying and staking being done by corporations distinct and separate therefrom. The entire tract has been held by lots and blocks, and all improvements made prior to the entry were made with reference to aforesaid survey and plat.

It appears by copies of deeds herewith submitted, marked B,
307 C, D, E, F, G, that Robert Shields has ever regarded this tract, both prior and subsequent to his entry, as town property. And the testimony shows that his occupation and improvement thereon were made with special reference to this feature and not for agricultural purposes. The testimony of Mr. Armstrong shows that this property has been held and taxed by lot & block, and all the witnesses, [and all the witnesses] appear to have regarded this tract as city or town property, and that it has been held, transferred, and occupied as such. Mr. Shields came into possession of

several lots on the tract so surveyed, laid out, and platted in 1855. In the spring of 1856 he built a dwelling house, but did not occupy it himself or with his family that year. In June, 1856, he sold the house and lot, with several other lots, to John Beeson, (see doc- "F.,") and that Beeson occupied the premises so sold and conveyed until the fall of 1857. (See Hileman's testimony.) In July, 1857, Shields placed upon file his declaratory statement to pre-empt the SE. ¼ of sec. 10, town. 13 N., range 10 east, and states in such declaration that he settled upon said tract the 10th day of April, 1857. (See file 4,521;) he afterwards withdraws this file, (date of withdrawal not given,) and the tract was entered by Thomas Hawes on the 22d of September. Seven days prior to this entry, to wit, the 15th of September, Robert Shields files his
308 declaratory statement to pre-empt the tract in contest, alleging his settlement to have been made in 1856, (see file 5,974.) On the 21st of November, 1857, he enters this tract, and in November and December, 1857, and January, 1858, conveys to others his entire interest in the tract, (see doc. D, C and G,) and returns to the tract upon which he first filed, and is now living with his family upon it, (see testimony of J. C. Hileman). The testimony clearly indicates that he has ever regarded this tract as town or city property, and that he never contemplated making such settlement and use of it as contemplated by the pre-emption laws of 1841—every transaction of his and others, prior to his entry, having sole reference to its value as town or city property. He acquired right of possession by purchase under such feature; his occupation and disposition of the property were all unmistakably proved to be in especial reference to its value as city property, and not for agricultural use and purpose. The evidence of W. R. Demarest, Lorin Miller, George M. Mills, George Armstrong, and J. C. Johnson, shows that an understanding was entered into by Shields, prior to his entry, by which he (Shields) was to convey certain lots to certain parties having claims
309 thereto after such entry should be made, and by such agreement induced such claimants not only to withhold opposition to it, but to aid him in obtaining it. Such agreement is in direct violation of the terms and intent of the law of 1841, under which he seeks to obtain title to the tract in dispute. His settlement upon and file of intention to pre-empt another tract in dispute, together with the sale and transfer of all his right, title and interest immediately after his entry was made, and return to the tract he first filed upon, and his continued residence thereon, with this, clearly indicates that he did not contemplate a bona fide compliance with the agricultural pre-emption act of 1841. With the date of his alleged settlement upon this tract, April 15, 1856, as stated in his declaratory statement, also shown by the testimony of Byers and others is eighteen months prior to the date of such file, which bears the date of September 15th, 1857—fifteen months after the time in which he had a right to file, as provided by the act of 1841, had expired. His attempt to show the prevalence of a claim club in the vicinity which threatened, &c., and committed acts of violence, without attempting to

show that any such threats or acts were directed to Mr. Shields,
310 in case he should place his declaratory statement on file, is not regarded as having any value in this case. The parties defending this suit were invited to introduce any testimony showing that threats were made to Mr. Shields, but I declined receiving testimony showing the existence of claim clubs or unlawful associations, having no connection with this case—they not having threatened acts of violence to Mr. Shields. His settlement upon, and improvement of, and present residence upon another tract, would not indicate that his actions have been governed by fear of personal violence. The foregoing conclusions are the result of a careful examination of the testimony herewith submitted, and incline me to the opinion that the entry of Robert Shields was not made in conformity with the provisions of the preemption law of 1841, and that the same ou't to be cancelled.

It is proper for me to state that the register declined to act officially in this case—he having prior to his appointment been employed as an attorney in the case. This fact was made known to the parties prior to the commencement of the trial, all of whom, as a mark of respect to him, kindly consented to his withdrawal; he, therefore, can in no wise be held responsible for consequences which may result from this investigation.

Yours, with much respect,

ADDISON R. SILLMAN, *Receiver.*

311 [Examined.]

WASHINGTON, *8th June*, 1859.

Hon. Jacob Thompson, Sec'y of the Interior:

SIR: In the case of Robert Shields, appealed to you from the decision of the General Land Office, I beg leave to refer you to the points and grounds ot appeal, as contained in my letter of this date to the Commissioner of the General Land Office; also, the argument herewith marked No. 1., for the general principles upon which the said appeal has been taken; and to this argument, more particularly for the reasons and authorities on which the points of the appeal, as set forth in my letter, are based. Before proceeding to sustain the points upon which the said appeal is taken, I beg leave, for the better understanding of the case, to state that the precise facts thereof, as deduced from a carful examination of the record and evidence, and which I offer myself ready to sustain before you, and ask leave to do so, if denied in any particular.

In 1855, and before the lands were surveyed, a company, or companies of private individuals, went to the point where the town of Omaha now exists and, by way of speculation, laid out and surveyed and lithographed a town site, embracing some 4,000 or 5,000 acres
of the public lands of the U. S. Most of the members of
312 this company or companies were non-residents. The divided the lots among them by lottery, and proceeded to issue title for the same, in the shape of assignable and transferable scrip. This scrip was sold and transferred, by a mere quit-claim assignment or

deed throughout the Union, to any speculator in town sites or lots who would purchase. This was done in 1855, though the receiver in his report to the Commissioner erroneously represents that the survey and laying out of this town and the lithographing of the map thereof was done in 1856. Knowing they had no title under the laws of the U. States to the said lands, the said company, and such speculators as became purchasers of their lots, formed themselves into a "claim club" and "vigilance committee," and established a code of laws, in open violation of the laws of the United States and of all civilized codes, for the express purpose of defeating and rendering nugatory the pre-emption laws of the U. States, and securing to themselves, in open violation of law, the said town site, and 320 acres in addition to each member of the company. This company embraced nearly every member of the community, including the territorial and federal officers, executive, legislative, and judicial, who, if they were not active members of the company, gave it their full countenance and support, and countenanced and sustained its illegal and violent rules and regulations to defeat the execution of the laws.

313 This company was organized and in full operation from the 1st of January, 1856, until the fall of 1857, during which time it was not possible with safety to life (without the consent of the said company) for any settler to exercise, or attempt openly to exercise, his rights under the pre-emption laws of the U. States, within the vast district of country selected by the said company as its town site or any addition made thereto. Robert Shields, the claimant in this case, a sober, discreet, and law-abiding citizen, was never at any time a member of this law-defying and law-resisting company; but being anxious to exercise his right of pre-emption as a pioneer American citizen, and at the same time anxious to avoid the penalties and opposition of said company, and supposing that a little time would restore the reign of law and order, he purchased in 1855, or the early part of 1856, a number of lots from the said company or its assignees, by a quit-claim deed, known to be utterly void and valueless, at a distant and remote part from any settlement on said assumed city limits, and for the purpose of securing his pre-emption right to the quarter section now claimed, erected a dwelling house thereon early in the spring of 1856, and made other improvements on the said land for the real and then avowed object of securing a pre-emption

314 right to the same, intending to inhabit the same with his family, as the pre-emption law required. In the latter part of June, 1856, fearing from the violence and terrible energy with which the said claim company through its armed vigilance committee punished every one who took any step to secure a pre-emption within the extended limits of said assumed town site, that he would fail to secure by pre-emption a home for his family, he sold out his said improvement and purchased an improvement at a point many miles distant from the assumed jurisdiction of said claim company and its vigilance committee, viz: on the Elkhorn river, in sec. 10, township 13, range 10 east, where he remained until the latter part of the summer of

1857, when finding that a wholesome public opinion had measureably overcome the power and influence of said claim club at Omaha, the said Shields abandoned all idea of obtaining a pre-emption at Elkhorn, and repurchased his original improvement near Omaha, on sec. 10, township 15 north, range 13 east, (being the land now in controversy,) and immediately proceeded to erect a new dwelling house thereon, and to inhabit and improve the said land, in accordance with the pre-emption law of 4th Sept., 1841, with the view and purpose of completing his pre-emption right at that place; that having completed his new dwelling house and inhabited the same, and made
315 the proper improvement on said land, as required by said pre-emption law, he made his declaratory statement, for the purpose of pre-empting the same, on the 15th of Sept., 1857, and having inhabited the said new dwelling house with his family until the 21st day of November, 1857, he made his entry of the same on that day, according to law, before the register and receiver of the district, and received the usual certificate of purchase; that when the said Shields repurchased the said settlement, late in the summer of 1857, as aforesaid, there was no settler upon said land, and no improvement on the said land except that made by himself in 1856, as aforesaid, and no other settler but himself, and no other improvement on the same when he entered the land as aforesaid except that made by himself in 1856, and the new dwelling house and improvements made by him after his repurchase in the summer of 1857. ☞Let it be remembered, then, in the consideration of this case, that the said Shields made such improvement on this land after he returned to it in 1857 as to entitle him to enter the same by pre-emption, if he had never settled or improved the said land before, and that there is not a particle of evidence in any part of the record to controvert the fact. Let it also be remembered that at the time of his said entry there was no other settler or claimant on any part of said land, and no other
316 person authorized to enter the same by pre-emption. It is clearly and distinctly proved, and is uncontradicted, that the said Shields lived on the said land with his family in the dwelling built on the same after his return to it in 1857, as aforesaid, and continued to live there until many months after his said entry. It is alleged by the receiver, in his report to the Commissioner of the General Land Office, that the said Shields made a declaration of his intention the 15th of July, 1857, to claim a pre-emption on the land occupied by him at that time on Elkhorn river, which was at a time when said claim club and vigilance committee were in full operation and held supreme power over pre-emption claims and claimants under life penalties, on the lands claimed by them as the site of Omaha. The evidence and the report of the receiver show that this declaration was withdrawn by the said Shields, with the consent of the register and receiver, (the same receiver who now makes this objection in his report,) as soon as he saw a hope that he might be able, without risking his life and those of his wife and children, to claim his legal rights on the land in controversy, and within the time which by the rule of the General Land Office such withdrawal is sanctioned,

317 viz: three months. This withdrawal was made within two months, and is proved to have been made with the sanction of the register and receiver, and in accordance with the uniform rule of the land officers at Omaha, who were the legal exponents of the law to claimants; but I am distinctly informed by the head of the pre-emption bureau that the claimant had the right and option by the rules of the General Land Office to make such withdrawal within three months after the said declaration was made. Mr. Shields swears, and so endorsed on his said declaration, that it was made by mistake, and under misapprehension. This withdrawal was, of course, known to the register and receiver the proper representatives of the U. States, and the legal judges of the pre-emption rights of Mr. Shields when he made his entry. The land occupied by Shields at Elkhorn, and on which he made the declaration which was thus withdrawn, was entered by another pre-emption claimant before the same register and receiver, on the 22d of September, 1857, two months before Shields was permitted by the same register and receiver to enter the land in question.

It appears by the evidence in the case and by the report of the receiver that Mr. Shields did not occupy personally or with his
318 family the land in controversy until after his return to the same, in 1857. Still, when he made his declaratory statement, in Sept., 1857, as aforesaid, and made his entry in November, of that year, he stated according to the truth of the case, as did also his witness, that his settlement was commenced in 1856, and completed in 1857. Yet it is to be remembered that he built a new house and made such other improvements after his return in 1857, and so occupied the said new house as to entitle him under the law to a pre-emption right upon the same, without any reference to his improvements in 1856. The evidence shows very clearly and conclusively, that though the absolute power of the claim club was broken when Mr. Shields returned to the land in controversy in 1857, yet he met with much opposition and persevering hostility from certain members of said club who owned or were the representatives of lots or scrips for lots on the land covered by his pre-emption, and that this hostility was so strongly manifested as to alarm his family and induce him to sell his land after his entry and remove from the same. The evidence shows very clearly that nothing short of a conveyance of all the lots embraced by his pre-emption (and it was all laid out into lots)
319 would satisfy these usurpers of the public domain and give him peace and safety.

The testimony of George Hepburn shows that public notice was published in the newspapers of Shields' intention to pre-empt said land. The evidence, refused by the receiver improperly, but subsequently taken and sent to the Commissioner of the General Land Office, but never examined by him, shows beyond all possible question that Shields could not, with safety to his own life and to the lives of his wife and children, have proceeded to pre-empt the said land during the existence of the said "claim club" and "vigilance committee," and before the fall of 1857. The removal of Mr. Shields

and his family in March, 1858, from the land in controversy, which he had been induced to sell for the reasons aforesaid, to the place at Elkhorn previously occupied by him as a tenant of the person who had entered the same for a pre-emption, after the said Shields had abandoned the same, to claim his pre-emption on the land in controversy, was for the purpose of giving peace to his family and avoiding the constant persecution of those who were the pretended owners of lots on the land entered by him. Mr. Shields' entry was made on the 21st of November, 1857, with a full knowledge of all the facts of the case, and with the concurrence of the receiver, (being the same who made the report to the Commissioner of the General Land
320 Office,) and after printed notice in the newspapers as aforesaid. On the 16th of February, 1857, long after the orriginal settlement and improvement of the said Shields upon the land in controversy, the city of Omaha was incorporated by the territorial legislature, with limits which embraced the whole of the town site laid out, as aforesaid, in 1855, and also the land in controversy. Subsequently the said city entered a municipal pre-emption, 320 acres, under the act of 23d May, 1844, which entry did not embrace the land in question. In 1858, and before the 6th of March, the Hon. Fenner Ferguson, Samuel R. Curtis, members of the House of Representatives; the Hon. George W. Jones, senator, and the Hon. James L. Orr, Speaker of the House of Representatives, who had purchased scrip for lots in the said town of Omaha as laid out in 1855, including that of the said Shields, and stating (notwithstanding notice of the said Shields' claim to a pre-emption on the land in controversy had been published as before stated) "that the said claims were not contested for want of a proper notice to adverse claimants," which was not true as to the said Shields; whereupon the Commissioner of the General Land Office, on the 6th March, 1858, addressed a letter to the register and receiver at Omaha, directing them to reinves-
321 tigate the said pre-emption claims within the corporate limits of Omaha, in all cases of adverse claims by "actual settlers and occupants" on lands embraced within the corporate limits of Omaha, and sending to the said register and receiver a list of all pre-emption claims within said corporate limits, and informing the register and receiver that lands within the corporate limits, but without the 320 acres claimed and entered by the said city under the municipal act aforesaid, "and not actually occupied for the purposes of trade," were subject to pre-emption. The register declined to act under the said instruction, and the receiver alone, who had no authority or instructions to act independently of the register, assumed to act, and did act, upon the case of Robert Shields; and on the 5th of June, 1858, made a report of the case of the said Shields, and reported, for reasons stated by him, that the evidence "inclined him to the opinion that the entry of Robert Shields was not made in conformity with the provisions of the pre-emption law of 1841, and ought to be cancelled." On the 12th January, 1859, the Commissioner of the General Land Office addressed a letter to the register and receiver at Omaha, stating that he concurred "with the receiver

in the opinion that the entry of Shields was illegal and ought to be cancelled, for the reasons set forth in the receiver's letter, and
322 informing the register and receiver at Omaha that the entry of the said Shields had been cancelled, and directing them to note the fact on their books and plats, and also directing them to notify Shields to apply for a return of his purchase money" From this decision of the Commissioner an appeal has been taken to the Secretary of the Interior, upon the firm belief that the said decision is founded in misapprehension and consequent error. I shall now proceed, as briefly as I can, to maintain the points and grounds of this appeal as set forth in my letter to the Commissioner of the General Land Office, viz:

1st and 2d. That the action of the receiver alone in the case being unauthorized by law, and in direct violation of the instructions and authority contained in the letter of the Commissioner of 6th March, 1858, any action of the Commisioner founded upon an illegal, unauthorized, and void report made by a person acting in violation both of law and instructions, must necessarily lack every legal and constitutional, and rational and logical element of validity and binding legal force. It is enough on this point to say that there is no provision of law which authorized the receiver alone to act on this case; and the instructions of the Commissioner of the General Land Office recognizing this fact directed his mandate to and called for the
323 joint action of the register and receiver. One judge of the Supreme Court might as well attempt to perform the functions vested in a quorum of that court, or one arbitrator when the submission or rule of court authorized two or more to act. The attempt to sustain this unauthorized action upon the ground of consent or acquiesence, is vain. It is an axiom known to every tyro in the law, that "consent cannot give jurisdiction." It is enough on this point to say that the receiver alone had no more power in this case than any other member of community. But the instructions of the 6th March, 1858, were as openly violated as the law: and to make the receiver's report a legal basis for the action of the Commissioner, it must be shown that an act and proceeding upon which the whole result depended, and which was in acknowledged violation both of statute law and written instructions, are valid and binding to the destruction and annihilation of the more sacred rights of a citizen. Had this point been presented to the Commissioner before he acted, it is supposed, there can be no doubt, his action would have been withheld. The above remarks embrace both the 1st and second point of the appeal. If well taken, the decision of the Commissioner must be reversed.

3d. That the letter of instructions and authority under which the receiver acted was confined to the cases of "actual occupants
324 and settlers" who should contest the right of said Shields. The evidence and the report of the receiver shows that none such appeared or existed; therefore the case was not embraced by his instructions and authority, even if he had possessed authority to act alone, which he had not. (See Com'r's' letter of 6th March, 1858.)

The 11th section of the act of 4th Sept., 1841, provides for deciding contests between "actual occupants and settlers" on the same tract ("quarter section") of land; and it was undoubtedly the purpose of the Commissioner's instructions to act under that section and under the act of 12th June, 1858, sec. 10, which authorized him to exercise appellate power in such cases. The very remedy of an appeal to you from the Commissioner's decision is based upon the provisions of the last-named act, which gives such appeal only in cases "when two or more persons shall have settled upon the same quarter section of land," or, in the language of the Commissioner's letter of the 6th March, 1858, between "actual settlers and occupants." There was manifestly no purpose on the part of the Commissioners, and there was no power if there was a purpose, to subject Mr. Shields to an expensive and harassing contest with every speculator in town lots or "scrip" within the extended limits of Omaha, in fact with any and every person who might choose to enter the lists, whether he set up any legal claim to the land as an "actual occupant
325 or settler" or not; in still other words, to make him a target or victim for the cupidity or smothered vengance of every disappointed speculator in the 4,000 or 5,000 acres of town lots in Omaha. Libel in admiralty, which goes against all the world, only authorizes those to intervene who have alleged an interest in the thing libelled. The Commissioner undoubtedly intended an orderly legal proceeding, in accordance with the existing provisions of law.

The 4th and 5th points of the appeal have been embraced in the remarks already made.

6th. The sixth ground of an appeal is that by the 12th section of the act of 4th September, 1841, "the register and receiver are constituted the sole and exclusive judges of the facts which entitle a settler on public lands of the U. States to a pre-emption, and that their decision, when they proceed according to the rules previously prescribed by the Secretary of the Interior and act on a case within their jurisdiction, is not subject to the revision of any other officer of the government; and especially that such a decision, made by both register and receiver, "as the law requires," is not subject to the review of the receiver alone upon a re-investigation, though directed by the Commissioner of the General Land Office, and that an approval of such an illegal and unauthorized act of a receiver alone cannot affect a right, granted according to law, by the act of the register and receiver.

326 The said 12th section of the act of 1841 declares that "proof of the settlement and improvement required shall be made to the satisfaction of the register and receiver of the land district in which such land may lie, agreeable to such rules as may be prescribed by the Secretary of the Treasury," (now Interior.) The provision is copied from the 3d section of the pre-emption act of the 29th May, 1830, and necessarily requires the same construction. The only difference is, that by the act of 1830 the "rules" agreeable to which the register and receiver were to proceed in making their decision, were to be "prescribed—(i. e., previously—pre—before)—

prescribed by the Commissioner of the General Land Office;" while the act of 1841 requires those rules to be prescribed by "the Secretary of the Treasury," (now Interior.) This is all the difference between the two laws, and does not, it will be seen, in the slightest degree effect the legal power of the register and receiver, or the question under this point of the appeal, as to the legal effect of their decision upon the rights of a citizen. The legal requirement of a citizen who claims a pre-emption is that he shall make proofs of the facts which entitle him to the enjoyment of the privilege given by law, "to the satisfaction of the register and receiver, &c.," and to
327 nobodies satisfaction but that of the register and receiver, of the particular land district. That is the legal condition on which the right is given, with the single qualification that this shall be done agreeably to certain rules to be prescribed by an executive officer, which the register and receiver, the sole judges, are to observe in the performance of their duty under the law, and in the making of their decision. The legal effect of such a decision by the register and receiver, and whether their decision is subject to revision, was first decided by Mr. Attorney General Wirt on the 28th of August, 1819, under the pre-emption act of the 12th of April, 1814. The question put to Mr. Wirt was, "whether the pre-emption claims can be ascertained and decided upon by any other agency than that of the registers and receivers of the land district in which they are situate. His reply to the question is as follows: "I think not. The power is expressly given to them, without any power of revision elsewhere." The language of the law is "that in every case where it shall appear to the satisfaction of the register and receiver of the public monies of the Land Office that any person who has declared his claim of notice is entitled, according to the provisions of this act, to a preference, such person so entitled shall have a right to enter on producing a receipt from the receiver,' &c," (See
328 Attorney General's opinions of above date.) This provision of law in the act of 1814 is the foundation of the subsequent provisions of the act 29th May, 1830, and of 4th September, 1841; and this decision of Attorney General Wirt has been followed and confirmed under all subsequent laws down to the present time, whenever the question has been examined and decided, either upon principle, precident, or authority.

On the 21st of April, 1834, Attorney General Butler decided this question, under the 3d section of the pre-emption act of the 29th May, 1830, from which I have shown that the 12th section of the act of 4th September, 1841, was copied. In this opinion Mr. Butler refers to the above opinion of Mr. Wirt and concurs in it. The head note of this opinion of Mr. Butler is as follows: "The decision of the register and receiver upon the facts offered to establish a pre-emption right under the act of 29th May, 1830, is conclusive." "Those officers must observe and conform to the rules in regard to the mode and nature of the proof to be made which the Commissioner shall have prescribed in advance for that purpose. In weighing and deciding upon such evidence they act in a judicial capacity, and cannot be

compelled to act upon any judgment but their own. No officer is authorized to revise or reverse their decision." Mr. Butler goes on to show that even where the certificate of entry of the register
329 and receiver has been procured by fraud the only remedy is for the Commissioner or the President to withhold the patent for the land.

The compendious and illegal and arbitrary and despotic remedy of annulling and cancelling the entry by order of the Commissioner of the General Land Office had not then been invented or conceived, much less that of a reinvestigation by one of the land officers, and the annullment of an entry upon his report, as has been done in this case. (See Mr. Butler's opinion under the above date.)

In 1836 the same provision in the act of 29th May, 1830, received the joint, careful, and deliberate consideration and decision of President Jackson and his Secretary of the Treasury, Levi Woodbury, and his Attorney General, Mr. Butler; and a paper containing their decision was prepared and signed by the said President, and sent to the General Land Office as the final and deliberate decision of that administration as to the effect of the decision of the register and receiver upon the rights of the citizen under the provision in question. This paper fully confirmed the opinion of Mr. Wirt and Mr. Butler, as above stated. The 4th proposition of the said paper, which expressly covers this case, is in the following words:

"4th. When the officers (the register and receiver) have jurisdiction, and have proceeded regularly, the Land Office has no power to reverse their decision; but in such cases patents will issue, of
330 course, unless their is good reason to believe, from the evidence reported or other information, that the decision was obtained by fraud, or founded in material error of fact or law, in which case the patent will be suspended, as hereinafter provided."

This paper is signed: "Approved. Andrew Jackson. May 6th, 1836." (Vide 2 vol. of Burchard's Land Laws and Instructions, &c., pp. 92, 93.)

This doctrine and construction of this provision of the pre-emption law in question is fully confirmed and carried out by the Attorney General and by the Commissioner of the Land Office, and by the Secretary of the Treasury, as may be seen at pages 97, 108, 140, 549, 634 and 792 of the same volume. The same construction of the power of the register and receiver, and as to the finalty of their decisions under the provision of law now under consideration, has been freely and distinctly confirmed by the Supreme Court of the U. S. The langaage of the court is: "The register and receiver were constituted by the act a tribunal to determine the rights of those who claimed pre-emptions under it. From their decision no appeal was given." (Lytle *et al. vs.* The State of Arkansas *et al.* January term, 1850; 9 Howard, p. 333.)

From a careful examination I feel authorized to say there is no decision of that court in conflict with this, and on clear legal principles there cannot be.

331 The simple principle is, that when the law gives authority

to particular tribunals or particular officers to decide certain questions, and provides for no appeal from such decision, their decision is necessarily final. I have examined the debates upon the 12th section of the act of 1841, as reported in the "Congressional Globe," and find that the above construction of the power given to the register and receiver was conceded by all. (Congressional Globe and App'x, vol. 7, 2d sess., 26th Cong., pages from 193 to 203, and from p. 209 to 221.)

7th. The 13th section of the act of 4th Sept., 1841, prescribes an oath to be taken by all pre-emption claimants before making entry, in addition to the proof required by said act. The seventh point of my appeal is that the oath of the claimant, on the point stated therein, "is conclusive upon the Land Office," and for the purpose of its action is to be taken as true; and that the crime of perjury for false swearing, with the consequent forfeiture of purchase money and the title to the land, are not to be dependent upon the decision of the executive officer, but of the judicial tribunals. This point of the appeal is stated in the language of Mr. Secretary of the Treasury, John C. Spencer, one of the ablest lawyers in the U. S., in a circular to the registers and receivers under the act of 4th September, 1841, dated 11th November, 1843.

332 Reflection, I am confident, will bring the Hon. Secretary of the Interior to the same conclusion, upon the clearest constitutional principles. The forfeiture of the purchase money and of all title under the entry are consequent upon the crime of perjury by false swearing. If there is no perjury there is no forfeiture. Perjury is a criminal offence, a crime that can only be tried and established under our Constitution by a judicial investigation, and by the indictment of a grand jury and the verdict of a petit jury. For an executive officer to try incidentally the question of false swearing, and to enforce the forfeiture of the purchase money of the land without any "process of law," without which the Constitution declares "no man shall be deprived of life, liberty, or property;" would be an anomaly and a most clear and palpable violation of the express letter and clear spirit of the Constitution. The most unjust and absurd consequences would result from the assumption of such a power by an executive officer. For example, let it be assumed that the executive officer (the Commissioner of the General Land Office) can try the question of false swearing "without judge or jury," and without indictment or verdict, or any judicial enquiry whatever, then it would inevitably follow that a citizen might be deprived
333 of property, (money and land.)

Again, suppose the Commissioner should assume and exercise the power of deciding the question of false swearing, and impose a forfeiture of the money and the land, and the court and jury, upon an indictment for perjury, as in the case of the U. States vs. Stanley, 6th McLean's Reports p. 409, should render of "not guilty," and irreconcileable collision or conflict between the executive and judicial branches of the government would be exhibited, to the disgrace of our system and of our Constitution, and a man declared innocent of

a crime by the judicial branch would have suffered the penalty of the crime by a forfeiture of his property by the executive branch of the government. Whether, by the oath taken under the 13th section of said act of 1841, a citizen has committed the crime of perjury or not is essentially and inherently a judicial, and not an executive question, and the executive, legislative, and judicial functions of our government are forever separated by the Federal Constitution. (Constitution of the U. S., art. 1st, sec. 1; art. 2, sec. 1st; art. 3, sec. 1st; 2 Dallas, 409; Hayburn's case, note; Commentaries on the Constitution, sec. 1777, and authorities there cited.)

If the Hon. Secretary of the Interior, entertains any doubt
334 as to the correctness of the doctrine laid down in the 6th and 7th points of this appeal, I respectfully request that questions thereon may be submitted to the Attorney General for his opinion.

8th. The eighth point of appeal, viz., that the receiver was guilty of "gross partiality" in the reinvestigation and the report made by him to the Commissioner of the General Land Office, and that he wrongfully and illegally excluded material testimony which the said Shields was prepared to offer, will fully appear by the ex-parte affidavits of Samuel Clinton and others, sent to the Commissioner of the General Land Office, and now on file with the papers of the case. The receiver having been guilty of the conduct charged, there was no other mode left to Mr. Shields but to prove his conduct, and unjust and illegal action on the reinvestigation, by affidavits in the manner adopted, and a refusal to consider them because they were necessarily ex parte, will be a refusal to permit Shields to show that partiality and injustice.

9th. From the affidavits of said Clinton and others, showing the improper conduct and gross partiality of the receiver on the reinvestigation of this case, and also showing the refusal, by him, to take important and material testimony in favor of said Shields, were not taken into consideration by the Commissioner of the General
335 Land Office in acting upon the report of the said receiver, and in directing the cancellation of said Shields's entry upon the report of the receiver.

That this evidence should have been taken into consideration by the Commissioner in his decision of the case, is simply to affirm that if the partiallity and injustice charged, and the exclusion of material testimony have been proved as charged, the proof which establishes these charges should not be considered. This is too absurd to require argument or illustration. I have made this point upon the declaration to me of the clerk who examined this case, and reported thereon to the Commissioner; that the affidavits were not considered. No justice can be done in this case without considering these affidavits. There was no legal contestant of Shield's right of pre-emption; such as the 11th section of the act of 4th September, 1841, and the instructions of the Commissioner of the 6th March, 1858, contemplate, there having been, by the admission of all parties, and by the report of the receiver, no actual settler or occupant of the land, and no controversy, as before stated, except Shields', and no one in

ested but the said Shields and the U. States, and no other mode of proving the injustice and partiality of the receiver; this evidence should unquestionably have been considered. The elemental principal is that a person not legally interested cannot be a con-
336 testant by any code of laws known among men, civilized or barbarous, and that to concede to one the right to contest, dispute, and embarrass an alleged legal right, who has by concession (as in this case,) no legal right to sustain, is an open and gross violation of the rights of an authorized and legal litigant; an alleged legal interest in a controversy is the first element to become an actor in such controversy. The doctrine and legal axiom, "re inster alios acta," would have no foundation in the principle, and therefore no existence but for this elementary, common sense principle. The assumed 11th commandment of "mind your own business," i.e. don't interfere where you have no interest, and therefore no legal right to intervene is the result of this principle, and is recognized throughout the world. The whole contest on the re-investigation was in the name of a party, viz., Omaha city, in its corporate capacity, which, by concession, had no right to appear and contest.

10th. That weight was given to illegal testimony, both by the receiver and by the Commissioner, who confirmed this report without a thorough and careful examination of the case. For example, the report of the receiver is headed by the declaration that the city of Omaha appeared and contested the pre-emption right of Mr. Shields, and that the said city, in this illegal and
337 unauthorized contest, was represented by three mortal attorneys, including the corporation attorney, "with speculation in their eyes," and who of course brought their whole park of artillery, professional and sophistical, to bear against the rights of this poor pioneer settler and pre-emption claimant; even what the claimant had done under the very advice and sanction of the register and receiver was questioned, and into the grounds of forfeiture by these cunning "feed counsel" of the city of Omaha, who had come to be "residuary legattee" of the Omaha City Company "and was attemping to accomplish, through "the craft of the law" and by the aid of base interested witnesses what the "claim club" and the "vigilance committee" had attempted to do by open violence. Hence the testimony of Lorin Miller, Wm. K. Demarest, and others who were speculative owners of lots in "scrip-town," and therefore had a direct personal interest in defeating Mr. Shields' pre-emption, were brought forward as witnesses before the receiver and suffered to testify to defeat his interest. The record shows, for example, that Lorin Miller "being sworn as to his interest, testified that he was interested in some lots covered by the pre-emption of Shields, and that "the register and receiver (while the register did not sit on the case, as re-
ported expressly and distinctly by the receiver in his report
338 to the Commissioner of the General Land Office,) decided Miller was not competent to prove any agreements between himself and Shields, he being directly interested;" yet this same Miller's affidavit of a verbal and void promise of Shields to convey

certain lots to him was received and sent to the General Land Office, and was the foundation of the Commissioner's order to the register and receiver—not the receiver—to reinvestigate the case. Wm. R. Demarest, also an interested witness, who had received money from some eastern abolitionist and friends to invest in real estate, and who had bought of himself as the agent of his eastern friends, and had deeded to his eastern friends certain lots which he owned by a void quit claim, lottery deed in "scrip-town," and who was, therefore, directly legally liable to his friends for a fraudulent misapplication of his friends' funds for his own benefit, is another of the witnesses whose testimony was received by the said receiver to show that Mr. Shields had made some sort of a vague, implied, verbal, void promise to convey the lots he thus claimed for his defrauded friend if he, the witness, would not oppose Shields in obtaining a pre-emption to which he was entitled by law. The truth is, (as abundantly apparent from
339 the evidence to any one who has or will examine the case with care,) that these scrip-town speculators having failed by violence to obtain their ends, pursued Shields with threats to defeat his legal rights, and with persuasions of their ability to aid him in securing his rights from the time he returned to the lands in controversy in 1857 until he finally sold out and quit Omaha to get rid of their persecutions. I have shown that the existence of any such promise of conveyance as is prohibited by the 13th section of the act of 1864, after the claimant has made his solemn oath, as required by that section, is to be decided by the judicial tribunal before a forfeiture can be enforced; yet, I may here say, without the fear of successful contradiction, that no such "contract or agreement" is alleged even, much less proved, as the law contemplates. No contract or agreement is even alleged that is not utterly null and void, a mere nudum factum, in violation of the statute of frauds, and void, utterly, if those who swear to it were not interested and incompetent on account of direct interest. The "agreement or contract" refered to in the said 13th section of the act of 1841, is necessarily a contract which has some force or legal validity, and not one utterly nugatory and void and of no legal effect; one that shows that it was not the intention of the claimant "to appropriate it—the land—to his own
340 use or benefit." Nothing can be clearer from the evidence than that this was Shields' intention, and that he carried that intention into complete effect by abstaining from making any contract which could possibly impair or render questionable the appropriation of the land after he had entered it "to his own exclusion, use, or benefit." In fact the complaint against him is that he refused, against all the threats and artifices of these harpies, to make any such contract or agreement, and the base effort is made to defeat his claim because he would not do so. If he had yielded and made a contract compelling him to deed the lots claimed by these "scrip-town harpies," no opposition would have been made to his claim, (though a violation of the law;) but as he refused to do so they seek to wreak their vengeance upon him because he refused to violate the law. A "contract or agreement" conceeded to be of no legal force

or validity, never recognized by the alleged maker, and which is only alleged to have been made by interested witnesses, cannot affect the rights of the claimants; but I again repeat, upon the reason and justice of the case, and upon the authority of Mr. Secretary Spencer's circular, and the general law of the land, that this is a ques-
341 tion for the judiciary and not for an executive officer, acting upon the evidence of interested witnesses and the illegal and unauthorized report of a partial and probably interested officer, who has excluded legal testimony and perverted and tortured, for the purpose of defeating a just right, that which was legal.

It is alleged in the report of the receiver, as a material fact, that Mr. Shields sold his land within a short period after his entry; and this is ingeniously paraded, with artful and sanctimonious show of candor and conscientiousness, to prove that Shields entered this "scrip town" for purposes of speculation and not agriculture. This is the final "trump card" of this excluder and smooth and ingenious perverter of legal testimony, this federal officer, charged with the protection of the rights of the citizen, who strongly advised Mr. Shields not to file his declaratory statement, "on account of the existence of said claim club, and the threatened violence from it," as stated in the affidavit of Mr. Shields; and afterwards in an official report recommended, with an affected and jesuitical show of candor and disinterestedness, becoming an honest and faithful public officer, without any legal authority, (after rejecting legal testimony of the most vital importance and perverting the import and legal
342 force of that which he did not dare to reject,) a rejection of a just claim, because the claimant had followed his advice and that of Gov. Izard, an officer who united with the register, under the solemn sanctions of his official oath, with a full personal knowledge of all the facts of the case, in granting a pre-emption to Mr. Shields, and afterwards made such a report as I have described to destroy the right which he had officially sanctioned. I have heard with much pleasure since I commenced the careful examination of this case that the President has evinced his appreciation of his official merits by removing him from the responsible post which he thus abused and disgraced, "and their works shall (do ?) follow them." "Cursed be he that removeth his neighbor's land mark," doubly accursed is the public officer who perverts his official power and authority to destroy and defeat the title of his neighbor to his lands, which he had thus officially sanctioned. But I respectfully contend there is nothing in the pre-emption system which was intended to operate as a "restraint upon the alienation" of landed property. When the title (right) of Mr. Shields was made complete by a compliance
343 with the conditions of the pre-emption law, he was as free to sell the land as any other owner of real estate. As a pre-emption claimant he stood on the same footing with any purchaser at private sale. All the evidence, and that of the receiver's unauthorized report, which shows what he did with his land, after he became the absolute owner of it, is totally irrelevant to the case. Again there is nothing in the pre-emption laws, or in the policy on which

they are founded, which looks to or restrains the use which the pre-emptor is to make of it. He is free to sell it for town purposes or any other purpose. If it adjoins a town or village which he thinks may call for its use for town or village lot purposes, he is as free as any other proprietor to devote it to that use. In short, when he has paid his money he owns the land "ab inferos usque ad cœlum," and may do what he pleases with it. If this were not so, it would be most extraordinary, and every free and independent citizen would avoid a pre-emption which fettered and restrained him in the use of his estate. He would approach Russian serfdom, in so far as he was bound to the soil. ☞ A careful examination of the debates on the passage of the act of 1841, as reported in the Congressional Globe, will show that the provision against the entry of land "to sell the same on speculation," was intended to prevent men of wealth
344 and capital from monopolizing large portions of the public lands by employing men of no capital, under "contract and agreement," to acquire pre-emption rights, to be transferred and assigned in whole or in part for their benefit, under such contracts and agreements; hence it was provided, by the 13th section of that act, that the claimant should be required to swear before he consumated his entry that he had made no such "contract or agreement" "to sell the same on speculation" to such capitalist nor for "the benefit of any person except himself or herself," and that the object of the settlement and entry was to appropriate the land not to agricultural purposes, but "to his or her own exclusive use or benefit," but not for the benefit of the capitalist. This intention is as perfectly fulfilled by selling the land the very day after he enters it for the purpose of laying out a town thereon or making an addition to some town already laid out, and putting the money in his own pocket, as it would be by remaining on the land and cultivating it. The oath and object of the law are, that the claimant's purpose is to appropriate the land, whether he sells or cultivates the same, to his or her "own exclusive use or benefit." If he cultivates the land, that is an
345 appropriation to "his own use;" if he sells it for the highest price he can get and for any purpose the purchaser chooses to appropriate it to, and puts the money in his own pocket, that is an appropriation of it to his own exclusive benefit. (See Congressional Globe, as before cited, on page 24 of this paper.) But I again repeat that, so far as the land office is concerned, in consumating the entry, the oath of the claimant upon the question of intention is conclusive, subject alone to revision in the judicial tribunals. The department has decided upon full deliberation that the lands within the corporate limits of Omaha, but outside of the said cities' entry under the municipal pre-emption law, is legally subject to the right of pre-emption. If, in the heated imagination of some "scrip town" speculator, who believes another Palmyra is to rise at that place, he offers a speculative price for the land, there is nothing in the law that prevents the claimant from accepting such offer. To hold a contrary doctrine, would violate the law and the legal right of an owner over his property, and would practically defeat the said decision of the department and every entry made under it in similar localities.

11th. The eleventh point of the appeal is, that the receiver, even if he was authorized to act without the register, made no de-
346 cision from which [from which] an appeal could be taken under the 11th section of the act of 1841, and which the Commissioner could properly confirm. The language of the said receiver is that the facts of the case, (excluding those wrongfully rejected by him of course,) including the illegal testimony of interested witnesses and the subtle opposition of the ingenious counsel of the "City of Omaha," which had no legal right to appear as a contestant, and his own perverted view of the evidence, "incline him (me) to the opinion that the entry of Robert Shields was not made in conformity with the provisions of the pre-emption law of 1841, and that the same ought to be cancelled." And he takes special care to absolve the receiver, who did not act as the law and the instructions of the Commissioner required, from all responsability of this expression of the inclination of an opinion which was unauthorized by law and in opposition to the deliberate official decision of the register and receiver in favor of the said Shields. In acting upon this illegal and unauthorized report, made without authority of law, and in express violation of his own iustructions, the Commissioner evidently acted upon the case as one arrising under the 11th section of the act
347 of 1841, and the authority conferred upon him by the 10th section of the act of 12th June, 1858; that is he treated it as a case of contest, where "two or more persons had settled on the same quarter section of land." In this he was entirely mistaken, as is shown by the evidence, and admitted by the receiver in his report. It is also manifest that both the receiver and the city of Omaha acted under that any entry by pre-emption within the extended corporate limits of the city was illegal, and that the said city was a proper legal contestant on the investigation of every such entry. In this they were both mistaken, according to the decision of the department declaring such lands when without the limits of the municipal entry legal, upon the proper proof of inhabitation and improvement of the same according to law. The consequent action both of the receiver and the Commissioner upon his illegal action were erroneous. The Commissioner's power under act of 4th July, 1836, relates to the performance "executive duties," "under the direction of the President of the United States," and cannot be extended to the revision and reversal, upon the report of a receiver alone, of the judicial action of the register and receiver under the act of Congress; and the act of 3d March, 1846, as continued by the acts of 3d March, 1853, and 26th June, 1856, in relation
348 to "suspended entries," does not apply to the action of the Commissioner in this case. I may here refer to the 7th volume of Attorney General's Opinions, to show that the municipal pre-emption law requires the same proof of "occupation and improvement" by a town or city, to give it a claim to the quarter section in controversy, that the law of 1841 required, and, that as the city of Omaha had made no improvement on this land, it could not be a contestant under the 11th section of the act of 1841. ☞I may further

remark that the Commissioner, by directing a return of the purchase money to Mr. Shields, in directing his entry to be cancelled, shows that his decision is not based upon a forfeiture resulting from false swearing, in violation of the 13th section of the act of 1841, because in case of such false swearing as to any of the facts therein required to be sworn to, the law expressly provides that the purchase money shall be forfeited, and therefore could not lawfully be returned.

12th and finally: The 12th point of the appeal is, that as the land in controversy is by the decision of the department legally subject to pre-emption, and Mr. Shields was the only settler thereon, and has proved a full and fair compliance with the requirements of the pre-emption law, and been permitted to enter the land, he has not been legally and ought not to be deprived of his right to the same.

349 The land has been decided to be subject to pre-emption. If Shields is not entitled to enter it no one else is. No one else claims such right upon this land. The evidence shows that he has twice complied with all the substantial requirements of the pre-emption law. He has never had a pre-emption on any other land, and, in the language of the present Commissioner, in his circular of the 3d December, 1856, and in the fair and honest spirit and policy of the pre-emption laws, it is "the purpose of the law to allow a claimant a pre-emption upon one tract and nothing more." Mr. Shields has never enjoyed this right except upon the tract in question. To deprive him of that right will benefit no one, unless it shall gratify the opposition and spleen of the "scrip town" speculators, who it is conceeded on all hands have no legal right to said land. When Mr. Shields first settled upon and improved this land the city of Omaha had not been incorporated. It was first incorporated by the act of the territorial legislature of 16th Feb., 1857. The ex-parte affidavits, which were not considered by the Commissioner of the General Land Office, and which I pray the Hon. Secretary to read, are a key to the just and true merits of this case, and will convince him that the most terrific power of lawless violence that has ever been exercised in this community, except by the vigilance com-

350 mittee of San Francisco, was brought to bear upon the pre-emption claimants near Omaha, including the said Shields; and that, instead of striking down his rights upon overstrained and perverted technicalities, it becomes his solemn duty to interpose the shield of his protection to secure him in rights given by law—rights of the highest and most sacred importance to the hardy pioneer settler. Speaking in the spirit of the pre-emption laws, and justly appreciating the importance of the rights which they give, the Supreme Court of the United States, in the case of Lytle and others *vs.* The State of Arkansas *et al.*, said, "The claim of a pre-emption is not the showy right which by some it is construed to be. * * * It is founded in an enlightened public policy rendered necessary by the enterpise of our citizens. The adventurous pioneer who is found in advance of our settlements encounters many hardships, and not unfrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of

purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years." Such is the right which the Hon. Secretary of the Interior is most respectfully and earnestly
351 asked to protect against a combination of violence and cupidity which deserves the most signal rebuke from every branch of the government.

I hand with this paper the copy of the most extraordinary paper addressed to the Commissioner of the General Land Office by the mayor and council of the city of Omaha.

I am, very respectfully, your obedient servant,

CHARLES E. SHERMAN,
Att'y for Robert Shields.

NOTE.—This name "Omaha" is supposed to be derived from the two Latin words omnis and habeo.

That a quit-claim deed by one not in the possession of land is void, see authorities generally.

Endorsed: E. 90,689. Charles E. Sherman presents Robert Shields' pre-emption case. Arguments in support of the points of the appeal in. Ans'd Feb. 1, 1860. R. 7, 453. June 13, 1859. Allan.

352 STATE OF IOWA, *County of Pottawattimie, ss:*

Samuel Clinton, being duly sworn, deposes and says, that he resides at Council Bluffs, in said county, and is engaged at that place in the practice of law, and has been a counselor-at-law of the Supreme Court of Iowa for seven years; that he was retained on behalf of Robert Shields to defend his right to pre-empt certain lands adjacent to the town of Omaha, and said to be included within its corporate limits, upon the re-examination of said right by and before the land officers at the Omaha land office; that he was the leading counsel engaged by the defence of said examination, and as such had charge of the preparation for trial of said matter on the part of the defence. Deponent further says, that prior to entry upon such examination he read the letter of the Commissioner of the General Land Office, at Omaha, which accompanied the papers returned in this matter, and several other matters of like character, and directed the said re-examination; that deponent was led to suppose from the said letter that the objection and the only objection to the entry of said Shields was, that it was a part of lands held for town purposes, and that the Commissioner held that the said lands were not ex-
353 empt from the operations of the act of 4 September '41, unless actually occupied and improved for the purposes of a town and of trade, not agriculture; that he prepared this matter for trial with a view to that fact and no other; and the defence was taken by surprise when on said trial the receiver held that all points relating to or in anywise affecting the right of said Shields could be inquired into. Deponent further says, that upon said re-examination the

receiver stated that the register for certain private reasons wished to be excused from setting in this case, and each party consented thereto, and the receiver sat alone in said trial; that at the opening of the same the receiver stated that he should allow to each party to introduce all the evidence he wished upon any point he might raise, whether the same was competent or not in the opinion of the receiver, in order that the court above might weigh it, and decide for itself whether the same was properly introduced, and pass upon its relevancy and value; that subsequently and during the examination of a witness for the prosecution, the prosecution propounded a question which seemed to deponent improper, and he objected to it, and the receiver sustained the objection, but allowed the offer of the prosecution to be entered upon the record, although the defence objected strenuously to it. Deponent further says, that the receiver raised the point, on said trial, that the said Shields
354 had not filed on the said tract in dispute until a very long time after his alledged settlement; and, also, that he filed on another tract during the time between his alleged settlement and his filing, and that the defence were compelled in consequence to show, as a reason why said Shields did not sooner file on said tract, that there existed in Omaha, whose objects, character, and power were such as to render it dangerous for said Shields to file on said tract any sooner than he did; that it was after six o'clock in the evening, which was the hour for tea of all parties engaged on such examination, before the prosecution rested in their examinations; that thereupon the defence called William D. Brown as a witness, by whom to show the existence, objects, character, and power of said association, preliminary to proofs of threats to said Shields, and intimidations, which prevented said Shields from filing on said tract prior to the time he did so; that the defence offered said proofs, and did so in good faith, and the said offer was made in good faith to follow the same by proofs of threats and intimidations made by said club and its members to said Shields; and also that the existence, character, power, and proceedings of said club were such as to consti-
355 tute good cause why an individual should not dare file on said tract; that said offer of testimony was made in several forms, and in each form ruled out by the receiver, and while deponent insisted upon the record, showing the offer as it was made according to the previous practice of the receiver, the receiver peremptiorily refused to allow it to go upon the record; that thereupon the defence offered the same testimony in a written proposition, as follows: "The defendant offered to prove the existence of an association composed of large numbers of men, who lived in and about Omaha, who were pledged to each other by the laws of said association, to protect each member in holding 320 acres of land; that the members sat as a court and executed its decree by violence, in many cases amounting to taking life; that it published its rule by posters and proclaimed them publicly; that the tract in dispute was under their special care, and that no person could file upon any part of lands incorporated as the city of Omaha with safety to his life;" that this continued from

1st January, '56, to August, '58; that the defence thereupon expressly stated that he would prove intimidations and threats addressed by the members of said club to said Shields, which prevented him from filing on said tract; that the receiver ruled
356 all of the said testimony, and of any similar testimony out, and stated that it was inadmissable; that the defence then stated to the receiver that he expected to occupy the remainder of the evening upon this point, and had not detained their other witnesses in attendance, and for that reason, and because it was nearly eight o'clock in the evening, and so dark it was impossible to read or write and to conduct the further examination of said matter, the defence asked that the case be adjourned, but the receiver refused to continue or adjourn said cause; that the receiver adjourned the preceding evening before six o'clock, and stated that his health did not permit him to hear the same in the evening; that the receiver was very much excited during the said trial, and refused to allow the defence any reasonable opportunity to produce counter proofs on account of his very strong prejudices in said matter, and because he saw that the defendant was unprepared for producing his witnesses and establishing his right in the premises. Deponent further says, that throughout the examination of the witnesses for the prosecution the counsel was in conference with the witnesses while upon the stand and in the act of testifying; that the defence ob-
357 jected to this, and called the receiver's attention to it repeatedly, and insisted upon a fair examination of the witnesses as in other cases, but the receiver refused to interfere in the matter, and to protect the defence against this outrage upon their rights, and upon the solemnity of a judicial examination, and replied to the said demands of the defence with repeated refusals. Deponent further says, that said examination was conducted by the receiver with outrageous partiality for the prosecution, and therefore for the reason that said Shields has not had an opportunity to be heard in his defence, defendant asks that the ex-parte affidavits be taken into consideration on the examination of the evidence.

SAMUEL CLINTON.

Sworn and subscribed before me, a notary public in and for said county, this 11th day of June, A. D., 1858. In testimony whereof I have hereunto set my hand and notarial seal.

[SEAL.] J. T. S. STEWART,
Notary Public.

STATE OF IOWA, *County of Pottawattamie, ss:*

James B. Test, being duly sworn, says he is an attorney and counselor-at-law, engaged in the practice of law at Council
358 Bluffs, Iowa, that he was present and was engaged on behalf the defence in the recent examination before the land office at Omaha City of the right of Robert Shields to pre-empt a tract of land in the north part of said city; that he has read the affidavit of Samuel Clinton, esq., hereto attached, and that the matters therein

stated, relative to the proceedings had on said trial, are true; that the deponent personally and on behalf of the defence asked an adjournment of said hearing and examination, on the ground that it was late in the evening, it then being nearly eight o'clock; that the defence had expected to occupy some time in establishing the existence and character of the claim club, and had not detained at the trial witnesses to other points, and deponent urged the receiver as an act of justice and necessity to adjourn until the next morning, and that the receiver, in great passion, refused to do so.

JAMES D. TEST.

Subscribed and sworn to before me this 16th day of June, A. D. 1858.

[SEAL.] J. T. S. STEWART,
Notary Public, Pottawattamie Co., Iowa.

359 STATE OF IOWA, *County of Pottawattamie, ss*:

John T. Baldwin, being duly sworn, says he has read the affidavits of Samuel Clinton and James D. Test, hereto annexed; that deponent was present at said examination of the right of Robert Shields to pre-empt certain lands therein referred to; that the facts and matters stated in said affidavits are true.

JOHN T. BALDWIN.

Subscribed and sworn to before me this 16th day of June, A. D. 1858.

[L. S.] J. T. S. STEWART,
Notary Public, Pottawattamie Co., Iowa.

TERRITORY OF NEBRASKA, *County of Douglas, ss*:

James M. Woolworth, being duly sworn, says he is an attorney-at-law, engaged in the practice at Omaha; that he was present as an attorney for the defence on the re-examination before the land office at Omaha, of the right of Robert Shields to pre-empt certain lands north of Omaha; that the facts stated in the affidavits of Samuel Clinton and James D. Test, annexed, are true.

360 Examination of Daniel D. Carr, before Clinton Briggs, probate judge of Douglas county, Nebraska, in the matter of the reinvestigation of Robert Shields, on behalf of said Shields.

The said witness having been produced before me, and sworn to answer truly such questions as should be put to him in this matter, testified as follows:

Were you in partnership with Robert Shields in the spring of 1856?

I was.

State whether or not you had, in the spring of 1856, any conversation with Robert Shields relative to his object in settling upon the tract in dispute, and if so, what he then stated to you.

I had conversations with him at several times. He told me he was building the house on the tract in dispute, to pre-empt 160 acres of land. After his house was completed, there was a man by the name

of Smith who attempted to pre-empt the quarter above him. The Omaha Club went up, I think, on Sunday, and pulled down Smith's house, and drove him off, and that is the reason why Shields did not attempt to get the land at that time, or for some time after.

State whether or not, from the 1st of January, '56, to the fall of '57, there existed an association of men known as the Omaha Claim Club, and if so, state its objects, modes of procedure in its meetings, and in carrying out its objects, who were its principal members.

361 The Claim Club existed from 1st of January,'56, to August '57; its members were principally citizens of Omaha and Council Bluffs, Iowa; most of the citizens of Omaha were members of it. Its object of the association was to protect persons in holding 320 acres of government lands, whether residents or not of the Territory, and to protect the lands laid off by the Ferry Company, and the Omaha City Company for a town site. All the members of the Omaha City Company but one lived in Council Bluffs. The members of the club were armed with the arms of the United States, from the armory at this place. When any person had transgressed the laws of the club, he was arrested by some of the members, who were usually armed when on such service, brought before the club, and tried in a summary manner. The question whether the accused had a right to settle upon the lands was first tried before the members. The vote was then put, and if it was decided by the members that he had no right to settle upon the land according to the rules of the club, the president issued his order that the accused be put in the Missouri river, unless he withdrew from his lands and all claims to them. A committee was then appointed to execute the judgment. On these trials, parties usually appeared by counsel, who examined witnesses and summed up the testimony to the members of the club.

362 Attached to the club was a secret branch, known as the vigilance committee, whos special business it was to discover if any person filed or settled upon Omaha city or its additions. William N. Byers was appointed to watch the filings at the land office, keep plats of the filings, and reporting the same to the club; and this duty he did.

In your opinion, could Mr. Shields have filed upon the tract in dispute with safety, prior to the fall of 1857?

Mr. Shields could not have filed upon the tract in dispute with any safety to his life, or that of his wife and children, or with any safety to his property, prior to the fall of 1857. The summary punishment of the club would have been inflicted upon him. My reasons for saying this are, that one Mr. Schnel, residing upon an addition to Omaha city, had his house, containing his trunk and clothing, burned by the club, and was forced to withdraw his filing at the point of the bayonet. Michael Calahan, who resided on a tract of land near that in dispute, was put in the Missouri river, and kept there until almost lifeless, when he consented to withdraw his filing.

Would you have testified to the above facts upon the trial before the land office had you been permitted to do so?

I would.

DANIEL D. CARR.

The above testimony having been read over to Daniel D.
363 Carr, and subscribed by him, he was by me sworn, and deposed that the same was true.

Subscribed and sworn to before me, this the 28th day of May, A. D. 1858.

[SEAL.] CLINTON BRIGGS,
Probate Judge for Douglas County, Nebraska Ter.

Examination of Allen Root, before Clinton Briggs, probate judge of Douglas county, Nebraska, in the matter of the reinvestigation of the pre-emption of Robert Shields, on behalf of said Shields.

The said witness, Allen Root, having been produced before me, was by me sworn to answer truly such questions as should be put to him, and thereupon testified :

What was your business in the spring of 1856 ?

I followed building, at Omaha and its vicinity.

In the spring of '56 did you build a house for Robert Shields on the tract in dispute ?

I did.

Did he state to you at the time he were building the house what his objects were? If so, state what he said.

He said at the time of making the contract for building the house that he was going to pre-empt 160 acres, upon which his house was to be built.

State what you said to him, if anything, relative to attempting to prove upon the tract in dispute.

I told him it would be very hazardous to file on the land, in the face and eyes of the club, and that he had not the pluck to do
364 it. I do not remember the words I used, but the idea conveyed by me was that he would be killed if he proved up on the land. I have been a member of the club.

What reply did Mr. Shields make to this ?

Shields said if he could not prove upon the land, he would go as far towards it as he could.

State what you know of the existence, character, objects, and mode of procedure of the association known as the Claim Club.

There was a club known as the Omaha Claim Club, which existed in active operation from January, '56, to August, '57. The object of the club was to protect persons and the town company in holding lands claimed by them. When any member of the club was trespassed upon by a "jumper," he presented his complaint to the "captain of the regulators," which was the name of the club when on active service. The captain called a meeting of the club immediately, and when the club assembled each party, the claimant and the jumper of the land, either personally or by attorney, stated his case, introduced testimony, and the question was submitted to the meeting, who decided in favor of one party or the other. The person defeated was then compelled to withdraw all claims to the land, and given
365 over into the hands of a committee, appointed by the presi-

dent for the purpose, that he might be compelled to do so or punished. The usual punishment was to put the convict in the Missouri river.

State whether the officers of justice in Douglas county were members of said club.

All the county officers were members of said club. It frequently happened that suits were brought before justices of the peace, when claims were in dispute, and the laws of the club were the authority cited and commented upon and argued from and countenanced, respected and followed by the courts in their decisions. No person who repudiated them could have been protected by the courts. A person whose rights were in any way infringed by the club could not have obtained any redress in the courts. The entire community belonged to it, and the public sentiment sustained it.

Could Mr. Shields have filed upon the tract in dispute prior to the fall of 1857 with safety?

He could not with any safety, unless with the consent of the club. In some cases men filed on claims for others, and merely to protect them from being jumped. Shields could not have filed upon the tract in dispute in his own right.

State what you know of the arming of the club, and its public demonstrations.

366 A call was issued for a convention of clubs, in the form of hand-bills and large posters. The convention assembled, and leading men of the county addressed the meeting in violent appeals to the passions of the people. The meeting adjourned, and the next morning the Omaha Club assembled upon previous notice, for the purpose of receiving a distribution of the public arms. As colonel of the county, I distributed the arms upon the order of the major general. About two hundred and fifty men was thus armed. They visited the first day in a body six places, burned one house, tore down two, and compelled three other men to remove in a very brief period. The next day the club was out, and proceeded to complete their work, but what they did I do not know.

ALLEN ROOT.

The above being read over to and subscribed by the witness, Allen Root, upon solemn oath by the undersigned authority, he swears the same was true.

Subscribed and sworn to before me, this the 28th day of May, A. D. 1858.

[SEAL.] CLINTON BBIGGS,
Probate Judge for Douglas County, Nebraska Territory.

367 TERRITORY OF NEBRASKA, *County of Douglas, ss:*

Robert Shields, being duly sworn, says, that from the 1st day of January, 1856, to the fall of 1857, there existed in the county of Douglas an association of men known as the Omaha Claim Club. Deponent was never a member of said club, but the persons who were members thereof declared its object to be to protect and preserve

the possession of tracts of three hundred and twenty acres of land by the claimants thereof, who were members of said club, and also of the lands claimed for town sites; that the members of this club resided mostly in Omaha city, in said county, and numbered nearly all of the prominent inhabitants at that time. Any purchasing lands in said county, unless a member of said club, was not safe in the preservation and enjoyment thereof against the arbitrary demands of its meetings. It had secret meetings, from which all persons not members were excluded, at which meetings it was understood the affairs of persons not members were discussed. That said club often resolved itself into a court, before which persons not members, who had taken, or were suspected to be about to take, the lands of members, were summarily brought and tried according to the forms
368 of criminal courts, and if convicted of an offence against the dignity and peace of said club, or members thereof, sentenced to some ignominious and often violent punishment, and given over to a committee who executed the sentence of the court without mercy. The officers of the government were all members of said club, or countenanced and approved its policy and action, so that even the property or life of a citizen destroyed by said club, however unjustly, no redress could be had in the courts. The said club constituted a great power, before which all bowed in fear. To fall under its powers was to expose one's life and property to sumary destruction. Deponent settled on the tract claimed by him for the purpose of making a pre-emption upon it. That he was prevented from filling his declaratory statement by fear of said club, up to the dissolution, or nearly so, of said club; that he was informed by the members thereof that if he filed upon said tract he would be put in the Missouri, which was a usual punishment inflicted upon those who dared to transgress the laws of said club; that Gov. Izard and others, officers of the government, advised deponent not to file on said tract, because in case he did so he exposed his own life and the lives of his wife and children to imminent danger; that at the time he settled upon said tract A. R. Gilmore, the receiver of public moneys
369 at Omaha city, strangely advised deponent not to file on said tract, on account of the existence of said club, and the threatened violence from it; that for these reasons deponent did not file on said lands before he did so. Deponent further says, that on the first day of July, 1857, he was cultivating the following tract of land, to wit, southeast quarter of section 10, township 13, range 10; that he did not so cultivate it with any intention of pre-empting it; that upon filing the declaration upon said tract, he inserted the number above named, having in view another piece of land, and inserted the above number by mistake; that it was the custom of the land office at Omaha to receive several filings from the same man, and suffer him to withdraw them whenever he pleased: that no particular importance was attached to the act filing, and deponent was not advised that it prejudiced his rights in any subsequent or other pre-emption to file upon a tract and withdraw his filing at any time afterwards.

Deponent did not live on said tract at any time prior to the time he proved upon the tract now in dispute.

R. SHIELDS.

Subscribed and sworn before me this 27th day of May, 1858.
[SEAL.]

Endorsed: R. Shields' pre-emption. Ex-parte affidavits. Exhibit P.

370 [Examined.]

Contested pre-emption.

ROBERT SHIELDS
ats.
OMAHA CITY.

On the 12th of January, 1858, the Com. of the General Land Office affirmed the decision of the receiver at Omaha, and cancelled the entry made by the said Shields, from which decision the said Shields prays an appeal to the Sec'y of the Interior.

A rule of the department, issued about this time, requires the appellant to state his objections to the decision of the Com'r before an appeal shall be granted. The decision of the receiver having been affirmed simply by the Com'r, the objection, to be noted, must refer to this, as there are no points other raised in the case.

The points of objection to the decision of the receiver were met, as we thought, and fully answered in our original argument on behalf of Shields, filed before the Com'r prior to his decision in the case, to which we beg to refer the Sec'y of the Interior. At the same time, under the rule, we offer the following points of objection to the ruling of the Com'r, in a more condensed form than in our original argument:

First, the receiver says that the evidence shows that the tract of land in controversy was laid off into lots, blocks, streets, and
371 alleys, in 1856. This is not true. The evidence shows that the surveying was done in the spring of 1855, and that in the fall of 1856 some of the stakes which had been pulled down by the Indians had been reset. But this surveying was not done by the city of Omaha, but, as the receiver says, "for corporations separate and distinct therefrom." He says further, "that the city of Omaha has made no improvements of said tract, in their corporate capacity." Without proceeding a step further, this shows that Omaha had no right to the land in question in any shape whatever, and as a matter of contest, the case should have been dismissed by him, if he had the power. If he had not the power, having jurisdiction, should deal thus summarily with Omaha. This proposition we regard as too self-evident to admit of argument. The case would then present itself to the department as an ex-parte one, Shields being the only party, the ex-parte affidavits of Shields, filed before the Com'r of

the Gen'l Land Office, would be legal and proper evidence. The question the arrising in the case would be: First. Did Shields enter upon the land in question with a view to settlement and cultivation? And secondly. Was there, at that time, any legal obstruction to prevent him from perfecting said right?

In the spring of 1856, Shields entered on the tract in ques-
372 tion, and built a house thereon, with a view to settlment and cultivation, as he informed the man who built a house for him thereon at the time. (See ex-parte affidavits.) He was competent to pre-empt. No legal objection to his competency is urged. The land was liable to pre-emption. It was not in the adverse possession of any one. To be sure the receiver says, "the entire tract has been held by lots and blocks, and all improvements made prior to the entry were made with reference to the aforesaid survey and plats." It must have been held by lots and blocks, for there is no evidence showing it to have been held by any solitary living being except Shields, or by any other after his temporary absence from it in the spring of 1857. The survey and platting, in 1865, was no possession. It was followed by no improvement, and no continued possession, by the parties making the survey. But on this point the receiver says, "that it appears, by copies of deeds marked B, C, &c., that Shields has ever regarded this tract, both prior and subsequent, as town property." If so, the property of what town? But this is not the question. It makes no difference what Mr. Shields' notions may have been. He may have been mistaken in regard to the fact. It is the province of the department to decide as to the legal fact—not whether Shields regarded this as town property, but whether it was town property. We ask the question—Was
373 it? If so, the property of what town? Was any town in possession? The evidence answers no. The receiver has sought very ingeniously to change the issue from the fact to what Mr. Shields thought in regard to the fact. Those to whom judicial questions may be submitted never allow such sophistry to usurp the place of legitimate and solid argument, or to mislead to wrong conclusions. But in regard to the deeds above refered to, one is from Omaha city to Shields, and was made in 1855. Suppose this to cover a portion of the tract, what does it amount to? Simply nothing, for the city had no more right or title to the land in question than the city of New York, and surely a deed of same date and tenor from that city to him could in no wise affect his right of pre-emption to the land in question. If the fact amounted to a tacit confession of the prior right of that city, the fact that she had no right whatever, not even that of possession, would surely be sufficient to dispel the effect of such tacit admission on the part of Shields. This deed from Omaha to Shields was a quit claim, which shows that Omaha, at least, had no confidence in her own title. It was an assumption of title, with a view to cheat and defraud the unwary or the ignorant, and will the government assist in carrying out that purpose, by the application of the inferences and conclusions to which it might lead
374 as against those whom Omaha may thus have victimized?

One other of these deeds, marked as exhibit by receiver, purports to be executed by Shields, June 24th, 1856, to Beeson, for lots 6 to 15 inclusive, in block 128½, in the addition of Omaha City Co. to Omaha city, in the county of Douglas and Territory of Nebraska. This is all and the only description of the locus in quo.

As the register assumes that Omaha has not even surveyed or platted the lots upon the land in question, and it never has attached this tract as an addition to the town of Omaha, the deed in question does not convey, nor was it intended to convey, any portion of the land in controversy. The legal presumptions are against the inference of the receiver, and to give them such direction as pointed out in his decision, we must disregard the facts in proof, the plain letter of the deed, and supply their place by indendment and implication. The presumption might be indulged that Omaha had made many additions to herself, but that any portion of this land is included in such additions is rebutted by the evidence and the assumptions of the receiver. The opposition have the affirmative of this proposition, and upon them rests the onus probandi. They have not shown it, nor
375 can they, for the best reason in the world—the fact does not exist. But suppose that we admit, for the sake of the argument, that this deed was intended to convey a part of the land in question, and that the evidence of Mr. Hileman, who says that Shields sold the house that stood on the premises, also; the same evidence shows that Mr. Shields purchased back from Beeson, in the fall of 1857; that he took possession there again immediately, commenced making improvements thereon, and that these improvements were made without regard to the streets. Was not the whole title to the premises then in himself? Was there at the time he filed his declaration, made his proofs, and paid his money, any conveyance of the premises out of himself to any other person? Under the danger surrounding his possessory right, if he ever did carry away a portion of the premises and abandon the possession, as soon as the danger was removed he returned thereto, recovered his title and possession, and, under the circumstances, is this to be used against him? The ex-parte affidavits show the danger surrounding him prior to the fall of 1857, and so des the evidence on file in the land office in numerous other cases where pre-emptors have been driven from their claims in the vicinity of Omaha by mob law, and will it not be proper for the depart-
376 ment to consider that evidence in this case, and govern itself by the facts and circumstances surrounding the whole case, in order to render justice to an injured man? Or must all this be kept out of view, and for what purpose? Does not the government whish to dispose of its lands, and to that end should not everything that will further this purpose find due weight and consideration? The department should not regard pre-emptors in the light of criminals and swinders, taking it for granted that they are guilty, and requiring them to show their innocence, but as far as possible should aid them to establish their rights, and look with suspicion upon every attempt to assail the integrity of their motives and action. If this is indicative of the true course and policy of the government, should the fact that Shields

had made a deed to a portion of the premises, after he knew to hold possession would be at the hazard of his life, to be urged against him, and the fact that he recovered not only possession, but the right, to be thrown out of the account altogether? Such may be its policy and its justice, but the policy is an unwise one, and such justice has none of the ameliorating concomitants of a wise and discriminating equity to commend it to the consideration of mankind in general.

377 The next point made by the receiver is predicated upon the testimony of Mr. Armstrong, which he says "shows that this property has been held and taxed by lot and block, and all the witnesses appear to have regarded this tract as city or town property, and that it has been held, transferred, and occupied as such." And is this kind of stuff to be considered as argument, and such points to be understood as constituting a part of the chain of argument by which the mind is to come to a legal conclusion in the case? What difference can it make whether Omaha city assumed to tax this property or not? Was Omaha city living upon the property or improving the streets, lots, or blocks? She did not even survey this land into streets, alleys, lots, and blocks. She never was in possession, corporeally nor by implication, but she taxed the lots. And this our government is to use to defeat the claim of a pre-emptor who was in possession, who did make improvements, and who did pay to the agent of the government the price stipulated by law for said lands. This argument would defeat every pre-emption to the 4,000 or 5,000 acres around the city. But "the witnesses appear to have regarded this tract as city or town property." Indeed; and what has the opinion of witnesses to do with the case? The government

378 has nothing to do with the opinions of witnesses; she deals in facts and legal conclusions from these facts. We cannot think for a moment that the Land Office adopted the reasoning of the receiver on this point, therefore we will give it no further notice.

The next point relates to the fact that Mr. Shields, in July, 1857, placed upon file his declaratory statement with a view to pre-empt another tract of land; that he settled upon it on the 10th of April, and afterwards withdrew his filing, and on the 22d of September, 1857, Shields files his declaration to pre-empt the tract in contest, and on the 21st of Nov., '57, proves up, pays the money for it, and is furnished a duplicate receipt of his entry. The point of objection here urged is this, that under the act of 1841 it was unlawful, after Mr. Shields had filed his declaration for one tract of land, to file at any future time a second declaration for another tract. The tract of land, to pre-empt which Shields filed his first declaration, was not, at the time, subject to entry at private sale, and under the law as well as the ruling of the department. (See pre-emption instructions in pamphlet form, issued from Gen'l Land Office, August, 1857, p. 24.) Both the law and the ruling of the department forbid such construction, therefore we dismiss this point without further comment.

379 The receiver proceeds by assuming "that the testimony clearly indicates that Shields ever regarded this tract as town or city property, and that he never contemplated making such settle-

ment and use of it as is contemplated by the pre-emption laws of 1841, and that every act and transaction of his and others prior to his entry had sole reference to its value as town or city property." What part of the evidence the receiver alludes to when he says Shields ever regarded this tract as town or city property, and that he never contemplated making such settlement and use of it as the law of 1841 contemplated, it is impossible to conjecture. We cannot find any evidence to warrant such conclusion. On the contrary, Chauncey Wiltse, a witness called by the city, in his deposition says: "I saw three or four furroughs along the east side of this pre-emption, and on the south side, and on the west there was, I should think, between 3 and 4 acres broken; it extended from the west boundary eastward so as to be all included in the pre-emption and right; west of the lots in block 128½; there was some breaking in the street about 50 feet wide and 220 feet long; this was in 18th street, as marked in the plat." The same witness also states that there was a small shanty or barn extending into the street, with hay on the top of the
380 shanty or barn. If the department can decipher his meaning or comprehend his logic when he assumes "that every transaction of his and others prior to his entry had sole reference to its value as town or city property," we shall submit that in this our minds are too obtuse to grasp the point or comprehend the compas and force of his logic. Town or city property, town or city property is the eternal howl of the receiver from the beginning to the end of his report. And where is the city or the town that has brought forward one solitary item of testimony to show the semblance of a right to the land in question?

But we have already, as we think, completely disposed of this point, and will give it no further notice. The receiver continues by saying that "he (Shields) acquired rights of possession by purchase," and that under such feature his occupation and disposition of the property were all unmistakably proved to be in special reference to its value as city property, and not for agricultural purposes. Shade of Locke & Bacon! and, we might ejaculate, the more modern Whately, only we believe his spirit has not yet gone to the land of shades. He acquired the right of possession by purchase. Argal his occupation and dispositions of the property was un-
381 mistakably proved to be in reference to its value as city property, and not for agricultural use and purpose. The connection between the premises and conclusion is so obvious that no one, we have a fair right to presume, but a crazy man, can trace it. Nearly the whole report is made up of just such incoherent jumbling together of fact and assumption, and attempts to base thereon arguments and conclusions, without attempting even from premises based upon wrong assumptions of fact, legitimate conclusions. "He acquired right of possession by purchase." This is not true. No one was in posession at the time of his purchase. No one had the right of possession. Therefore any deed or other writing purporting to give him possession, or the right of possession, could neither give him the one nor the other. He who executes a deed to

transfer a possession or right of possession to another, in himself, must center the rights he would thus confer. If such rights do not center in him, can he confer them? From whom then did Shields derive this right—from the city of Omaha, or Mitchell? They had neither possession or the right of possession, consequently he acquired neither from them. We are at a loss to precise why such an absurdity as this should be urged in this case. But suppose
382 that Mr. Shields had found some one in possession of the lands, but who had no right to it except mere occupancy, would it not have been entirely right and competent for him to have purchased the possession of the lands from the occupant, and could this fact have been urged against his right to pre-empt. Would the department, after the pre-emptor had filed his proofs, paid his money, and obtained his certificate, say that this would be a sufficient cause to annul his entry and refuse a patent? And for what reason? Simply because he had purchased the right of possession from another before he entered upon the premises himself, and that purchase a nullity? But suppose that other is not contesting his right, or if contesting it, it shall appear that he had no right to transfer to the pre-emptor? What then? Why should the government step in and urge such pretexts as these against the very class of men that the law has marked out for her special preference? But, says the receiver, the evidence of W. R. Demarest and others shows an understanding was entered into by Shields prior to his entry, by which he (Shields) was to convey lots to certain parties having claims thereto after such entry should be made. Would any court of justice, for one instant, entertain this as evidence in any suit between man and man. An understanding, a verbal agreement, if you
383 will, a nudum factum, a thing of no binding legal force whatever, is to be brought in and urged against this man to defeat his right to a tract of land which he had earned by all the forms and requirements of the law. The evidence shows that these understanding were never carried out by the pre-emptor, and thus all hope of making a point against him is effectually cut off. It is easy to divine his purpose. He hoped by a mere unbinding promise to throw these bloodhounds off his tract, and thus save himself from their bloody fangs. In our former argument we elaborated this point, and we feel sure it will not meet a moment's consideration in the investigation of this case. It cannot be that the department will so far disregard a principle universally acquiesced in and sanctioned by the highest legal minds, and made a uniform rule of decision by courts of justice. At the time these understandings were entered into, if such they were, Mr. Shields dare not have refused to yield assent to the demands of these men. He understood well the unseen and invisible hand which had struck down others, and only wanted a proper pretext to lay a deadly grasp upon him. So even if the agree-
384 ment had had a consideration to support it, and had been reduced to writing, a court of equity would have annulled it, and have released the unfortunate victim from its obligations. Could the department do less? Surely not. With what propriety,

then, can an understanding possessing neither merit nor justice, much less legal or binding effect, be urged as a consideration in this case against the pre-emptor? The date of his alleged settlement is eighteen months prior to the time of his filing. The law gives him but three months. We elaborated this point in full in our original argument, to which we beg leave to refer the department, and which reasons we again urge. Another point urged against Shields grows out of the fact that shortly after he had completed his pre-emption by making his proofs, paying the purchase money, &c., he sold the land in question to Cassady & Test, and some one or two other purchasers. This point also we elaborated in our original argument, and to which we also refer the department. At the time Mr. Shields made his proofs, paid his money, and received his duplicate receipt of his entry, his right to the land in question was perfected. If he step by step fulfilled the requirements of the law till at last the last act was done on his part, except to receive a patent for his land from the government, by what process of law or logic can a subse-
385 quent sale of the land by him avail the government or justify it in refusing to deliver to him his patent. Does the law say that if, between the time he pays his money and receives his duplicate and the issuing of the patents, he sells the land he shall forfeit it? No. With what propriety then is this fact urged against us? Necessity. A thousand things might compel a man to dispose of his land after he has pre-empted it, and before the patent issues to him. Has the department adopted as a rule that such sale shall vitiate the right of pre-emptors. We are not so advised. There are many such considerations which should lead the government not to make such rule of decision. In the case under consideration, the land in question, we may presume, was quite valuable at the time Mr. Shields sold it. Mr. Shields doubtless sold it at a high price. The duplicate receipt in his hand would be regarded by the purchasers as prima facie, and may be as absolute right of title to the premises. Now to say that because under these circumstances he chose to sell and they to buy, that therefore he had forfeited all rights to his land, would not merely affect him but the innocent purchasers, upon whom must fall ultimately the blow in this case. Courts of equity have interposed to prevent the execution of contracts where injury was likely to fall upon the innocent, and where
386 a power equally potent is lodged in the hands of a department which, by simply regarding the requirements of the law, and giving it force and effect, thus preventing a wrong at the same time that it does justice, and fulfills the requirements of the law should it not do so.

But the most extraordinary development connected with the taking of the testimony in this case may be found on page 7 of the report of the receiver, where he says: "His (Shields') attempt to show the prevalance of claim clubs in the vicinity, which threatened and committed acts of violence, without attempting to show that any such threats or acts were directed to Mr. Shields, in case he should place his declaratory statement on file is not regarded as having any value

in this case. The parties defending this suit were invited to introduce any testimony showing that threats were made to Mr. Shields. But I declined receiving testimony of claim or unlawful associations, having no connection with this case, they not having even threatened acts of violence to Mr. Shields." In short, the receiver first refused to permit Shields to prove the existence of claim clubs unless he would prove by the same witness (we suppose he means) that these clubs had used threats of violence to Mr. Shields; and then, immediately thereafter, he says he declined receiving the testimony
387 showing their existence, because they had not even threatened acts of violence to Mr. Shields. Thus, he characterizes the offer to prove the existence of claim clubs, and their acts of violence, as having no value in the case, because they had not shown that any threats or acts of violence were used towards Mr. Shields; and then he says he declined receiving the evidence Mr. Shields had to offer, because he says these claim clubs had not even threatened Mr. Shields. He refused the evidence Mr. Shields had to offer because it would not prove certain things. Pray how did he know? Why was not the evidence taken down, in order that the Commissioner of the Land Office might determine what it proved? The assumption of the receiver is false, as the ex-parte affidavits subsequently taken by Shields, and filed in this case in the Gen'l Land Office, conclusively show. We respectfully ask the Secretary to look at that testimony, and see how far it sustains the receiver in his assumption in regard to the evidence referred to, which he ruled out. It is hard to tell how he could come to such conclusion as quoted above from his report, when he absolutely refused to hear the evidence of the witnesses. If the evidence, when taken down, had neither shown the existence of claim clubs, nor threats, nor acts of violence, it would have amounted to nothing. And why should he have manifested so much sensitiveness upon this point and shut down the door upon such unjudicial reason as he adduces? But suppose that Shields had been able to show that such associations did exist, and that they drove off all men who attempted to pre-empt any lands which the city of Omaha had usurped or claimed by any right whatsoever, and that many such persons had been dealt with in such way as to
388 endanger their lives, their houses burnt over their heads, and they and families driven from the premises with force and threats, would it still have been necessary, as the receiver assumes, to have proved actual threats to Shields, and violence, in order to make the evidence legitimate and of weight? Yet this is the reasoning of the receiver, and by inference, of the Land Office also. This shows conclusively that the evidence should have been received; for that the existence of such clubs, and their acts of wrong and violence, would have been clearly and conclusively established is certain beyond cavil or doubt. The ex-parte affidavits filed in this case, and the evidence in numerous other cases of like import to this, in the same vicinity, pending in the office, prove the fact beyond a question. Then, as there is no longer any ground of contest as between the city of Omaha and Shields, the city never having been in

possession of the land, never having had any right to it whatever, and the evidence settling these points against her so conclusively that there is no room for doubt or cavil, we insist that there is no case of contest before the department, and the only point for consideration is whether Shields' entry should be set aside, not on account of a prior or superior right in the city of Omaha, but
389 on account of some laches or violation of the pre-emption law on his part. In this view of the case it is an ex-parte one. The ex-parte affidavits filed by Shields, above alluded to, were legitimately and properly taken, and form legitimate and proper evidence in the case, and as such we respectfully ask their consideration. One other instance of peculiar assumption and conclusion we quote from page 7 of copy of receiver's report. He says: "His (Shields') settlement upon, and improvement of, and present residence upon another tract would not indicate that his actions have been governed by fear of personal violence." Present residence? What motive could have prompted this language is hard to conjecture. His report bears date June 5, 1858, and why a remote circumstance like this is thrown in here, except with a hope that it may, in the haste of the moment, be connected with events at the time Shields made his proofs and perfected his entry. He evidently desires this fact to have an important bearing in the case, and yet it is one that can have no possible connection with it. In addition, the ex-parte affidavits show that these claim clubs ceased measureably in the fall of 1857, of which fact, doubtless, so knowing a man would have been cognizant.
390 It is enough, however, to say that doubtless this receiver was interested in the land in question with Omaha, if she could manage by any means to acquire a title thereto, and that his peculiar reasonings, assumptions of fact, exclusion of testimony, and most singular apologies therefor, may all be attributed to this cause. And it may not weaken this presumption to state that information of this kind, or similar character, decided the President to remove him, which he did, some time after this proceeding. In conclusion, we hope to be excused for recapitulating our grounds and arguments to some extent, in a kind of synoptical form. First, then, the city of Omaha, never having been in possession of the land in question, nor acquired any right thereto, as shown by the evidence, there is no case of contest presented for consideration; and consequently as a contested case there is no longer any question of the kind before the department.

Second. The only question for the consideration of the department then, is whether the entry of Shields should be set aside. We contend it should not. First. Because the land in question was subject to pre-emption. Second. Shields was competent to pre-empt it. Third. He did perfect a pre-emptive right, by settlement, by cultivation, of which he exhibited the proofs, according to law,
391 and finally by payment to the government of the stipulated sum per acre, and upon which payment the government acknowledged that all conditions precident to be performed by him had been done, and awarded him a certificate to that effect. Now it is urged that if

he did enter upon this land, it was not for the purpose of settlement and cultivation, but that he took possession by virtue of deeds of purchase from others; that therefore the legal intendment would be that he acknowledged in his vendors a prior right of some kind. But we have shown that this right on the part of his vendors was assumed, not real; a fiction, not a reality. The evidence shows this. Again, it is urged that he sold at one time some lots that formed a part of this land, and that forfeited his claim under the law. In answer we say that had he remained upon the land it is said he sold at that time, he would have done so at the peril of his life. As soon as that danger was removed he repurchased these lots, entered upon the premises again, made improvements, cultivated the land, and at the time, and before he filed his affidavits, exhibited his proofs and paid his money; the sole right was in him,
and no one had any right or title to the premises except him-
392 self alone. Again, it is urged that he did not prove up his
claim within three months, as the law requires. In answer, we say that, like the statute of limitation, the time when he could not have proved up without endangering his life ought not to be counted against him; that these clubs were in existence shortly after he entered upon the land, and continued in active operation till about a month before he did perfect his entry. (See ex-parte affidavits, and our former argument on these points.) A similar rule of construction to that adopted by courts of justice in the application of statutes of limitation we presume will govern the department in this case. What we urged in our former argument we here quote, as it expresses our view of the general principle, and we think a correct one:

"By this rule statutes of limitation, though of general import, are held not applicable to exceptional cases. The exception springs from the necessity of the case, or rather both equity and justice respect the demands of right, and to avoid the infliction of wrong will regard that as done which should have been done; or excuse an omission to aid the ends of justice (if the omission spring from necessity) or to assist in carrying out the intent of the legislator. So in the
case under consideration, the equity and justice surrounding
393 it, coupled with its peculiar circumstances, and growing out
of the imperative nature of the facts, make the exception itself a matter of equitable necessity. To disregard the principle is to deny the right, and render null the intention of the legislator. Two other reasons or points raised by the receiver, namely, the sale of Shields of the premises after his entry was perfected, and the alleged 'understanding' with others before he perfected his pre-emption right to convey to them portions of the land afterwards, are mere attempts to demagogue and pettifog the case through, and therefore, having once noted the points, we do not deem them worthy of notice in our summing up. The points are both untenable and would never be urged by any respectable lawyer. Thus have all the objections seratim urged against the entry of Shields, as we think, been successfully answered, and it remains only for the department to say whether, upon the evidence before it, the entry shall be confirmed; or if

the ex-parte evidence is not to be regarded as being presented in due form, whether the pre-emptor shall be allowed to take and present it in such form as may be prescribed by the department. Without intending anything offensive or disrespectful, we hope to be pardoned the digression when we express a conviction that the department will not close the door upon the ex-parte evidence if the case be
394 not made out in favor of Shields without it, and thus virtually deciding in favor of land-pirates and regulators in general, to the exclusion of the honest and enterprising pioneer, first to encounter hardship and privation in availing himself of the benefits of the pre-emption law. Before the entry of Shields upon this tract, a horde of this class, in moving mass, from time to time overran this tract of land and many other tracts in this neighborhood, in a kind of predatory manner, but never with any view except as a mere matter of speculation, never remaining upon it to occupy and improve it. At the time of Shields' entry it was unoccupied as any of the wildest lands belonging to the government, and never was occupied before that time by any person except by the surveyor in surveying and platting it off into streets. This is the sum and substance of the fact that is urged to defeat Shields, on the ground of prior right. The ex-parte affidavits show what facts he can prove and their materiality, should they not be received in their present form, and the report of the receiver shows that this evidence was excluded because no threats of violence had been used towards Shields by these claim clubs, he assuming that unless this fact should be established the evidence was of no force. In this he erred, and if Shields can prove the facts exhibited in his ex-parte affidavits, is it not the duty
395 of the department, should these be excluded, to offer him an opportunity of presenting the facts therein in such form as may place them properly before the department for consideration? But we cannot see why the evidence is not properly presented in its ex-parte form. The evidence offered by the city of Omaha shows conclusively that she has no right to the land in question, and as a contested case there is, therefore, nothing before the department for considereration; and if permission be granted Shields to take evidence, shall it be granted as though Omaha was still a contestor when her own evidence exhibts the fact that her claim to the land in question had not even an ideal foundation upon which to rest? The purpose of Omaha in contesting with Shields the right to the land in question, knowing that she possessed no valid right, was doubtless with the ulterior purpose of defeating his right altogther, but not with a hope by that proceeding of perfecting her own title. Last winter she appealed to Congress to pass a law permitting her to attach by additions all lands lying adjacent to the city, to herself, not entered or occupied by others, and thus the object of her contest is made manifest. The committee of the Senate to whom her memorial was referred reported unanimously against this application.
396 Again we beg leave to refer the department to our former argument upon the nature of this as an ex-parte case, and the reasons offered in favor of the reception of the ex-parte affidavits above

referred to as legitimate and proper evidence, on the part of Shields. To refer it back as a contested case would be to aid the city of Omaha in throwing additional obstructions in the way of right and granting her a permit to perplex and harrass one whose interests have already been delayed too long by her officious intermeddling and by speculators. If the policy of the law is to discourage littigation, no more effectual mode can be adopted in this case, to such end than to lose sight of Omaha altogether. We trust, therefore, that the Hon. Secretary of the Interior will take into consideration the ex-parte affidavits already presented by Mr. Shields, and thus bring to a speedy conclusion this whole case."

Very respectfully,

CHARLES E. SHERMAN,
Att'y for Robert Shields.

Endorsed: Shields' pre-emption case. Argument No. 1.

397 GENERAL LAND OFFICE, *Feb. 1st*, 1860.

MR. BEARD: Under cover of this is a sort of rejoinder to the report in the case Shields, which was drawn up by me in Sept. last, but which has been held up by Mr. Wilson till now. Mr. Sherman takes occasion to mention my name in connection with the report, and also to speak of certain verbal admissions made by me, to the effect that if it could be shown that Shields repurchased his claim from Beeson before he (Shields) proved up, then his entry might be filed for confirmation under the acts of '46 and '56. The contingency upon which this admission was made has not occurred.

Then again he says, I admit that after Shields returned to the Omaha claim in 1857. he filed within due time, taking the date of his return as the date of his settlement. Granting this, Shields has never claimed settlement as of that date, and if he did, his claim would be precluded under the Secretary's decision of 6th Oct. last, in the Herbade case.

So much for my admissions, which could have no weight, of course, in an official consideration of the case, but which were made under views presented by Mr. Sherman verbally, which the record makes no showing of, in one case; and in another, where, even granting
398 the facts, the benefit is denied by the Secretary in a formal decision.

Very truly yours,

BEN. D. SLOCUM.

(Private.) JULY 25TH, 1859.

DEAR SIR: Mr. Hendricks designed before leaving to reconsider the case of Omaha City against Robert Shields. His time was so much hurried as to prevent him from carrying out this purpose. Will you please give it your personal consideration?

Mr. C. T. Sherman has prepared an argument, with supplements, which, I think, are unanswerable. They are among the papers.

I am, very truly, yours, &c.,

F. RIGGER.

Joseph Wilson, esq., Acting Com'r.

Endorsement: Mr. Allan: Mr. Hendricks requested me to examine the argument and act upon this as if he had not acted at all. So when ready please let me see the argument and past action. Yours, J. S. W. July 25th, 1859.

Joseph S. Wilson, esq., Act'g Com'r Gen'l Land Office:

399 DEAR SIR: In the case of Shields, my understanding was, that after Mr. Slocum had reported you were to read the papers and arguments in the case, in connection with his report, and that I was then to have a short interview for the purpose of explanation.

I should be glad to have this course pursued, as certainly there has been writing enough in the case, unless you find difficulties which I cannot anticipate. The case I deem perfectly plain, and fully made out on our side. Mr. Slocum's report, as he explains it to me, reduces the case to one or two questions, on which I think my present arguments ample, and that you will find them so; if not, I will remove them in the way he has suggested to me.

As to the repurchase by Shields from Beeson, which, if made out, Mr. Slocum told me would, in his opinion, would entitle Shields equitably to a patent, I believe I am now fully prepared to satisfy you and Mr. Slocum beyond all question; if not, I will wait for other evidence of the repurchase before entry, suggested by Mr. Slocum.

I can demonstrate many errors and fallacies in Mr. Slocum's report in writing, but to you I think they will be apparent from what I have already written.

Very respectfully, your obedient servant,

CHARLES E. SHERMAN,
Att'y for R. Shields.

400 P. S.—As to the operations of the Claim Club, I shall be glad to have you read the affidavit of Mr. Parker, late receiver at Omaha, in the case of George Smith in connection with the evidence on that subject in the case.

Washington, 15th Sept., 1859.

[Copy.]

LAND OFFICE, OMAHA, N. T., *July 10th*, 1860.

Hon. Jos. S. Wilson, Com'r of the Gen'l Land Office, Washington, D. C.:

SIR: In compliance with your instructions of May 15th, 1860, we this day sold at pub. sale the following tracts of land, after having given the proper notice by publication of thirty days: The N. ½ of the northwest qr. 15, 15, N. 13, E.; the W. ½ of S. W. qr. of 10, 15, N. R. 13, E. The land sold for $1 25 per acre, the first tract being purchased by E. V. Smith, and the 2d by G. C. Morrel.

Very respectfully, your ob't servants,

JOHN A. PARKER, *Register.*
P. F. WILSON, *Receiver.*

401 Memorandum for Jos. S. Wilson, Acting Commissioner, &c., &c., when he reads the report prepared by Mr. Slocum, in the case of Robert Shields, in connection with the other papers and arguments in that case, as he informed me was his purpose.

1. It is fully admitted that the land in question is public land of the U. S., and subject to pre-emption.

2. It is conceded that Shields made the improvements thereon necessary to entitle him to a pre-emption; and that no other person improved the said lands or has any claim to it.

3. It is conceded that Shields made the declaratory statement within the time prescribed by law after his repurchase of his improvement from Beeson, in August, 1857, and that he proved up "to the satisfaction of the register and receiver" and that of the General Land Office, took the oath prescribed by the 13th sec. of the act of 1841, paid the purchase money, and received a certificate.

4. The evidence reported by the receiver, on the re-examination, shows, that after his repurchase of his improvements from Beeson, and his return to the land in August, 1857, Shields erected a new dwelling-house on the land, and moved into it before he entered the same, thus complying fully with all the requirements of the pre-emption law at that time, and after his said new settlement on the

402 land. This fact, though urged in my argument as conclusive, is not noticed in the report, nor is it in any manner denied.

5. The evidence shows that the "Omaha Claim Club" was in full operation before Shields sold his improvements to Beeson and bought a claim at Elkhorn, beyond the assumed jurisdiction of said club, and that it was not till the fall of 1857, in the opinion of many witnesses, including Mr. Parker, the register, that Shields could have made his claim with safety to his own life and the lives of his family, (see the affidavit of John A. Parker in the case of George Smith, handed herewith, also of the other witnesses on this point.) The report ridicules the idea of Shields being influenced by this club, (though its desparate and bloody character is admitted to be correctly stated by the said witnesses,) because Beeson, the purchaser of Shields' improvements, was not disturbed by them, and also because Shields himself was not disturbed by them at Elkhorn, far beyond its assumed jurisdiction.

This argument, like many others in the report, has no foundation in reason. Beeson made no claim to a pre-emption, and of course the club was satisfied. Had he been permitted to make a claim, there would have been some reason and fairness in this argument.

403 An examination will show that no one was permitted to claim a pre-emption within the very extended limits of Omaha in other words, within the assumed jurisdiction of said club, without consent of the Omaha City Company, before the fall of 1857. Those who were permitted to claim before that period claimed under an agreement with that company, or their successors, the mayor and city council of Omaha, in open violation of law, (see the memorial of the mayor and city council filed with my argument.)

6. The facts stated in the memorials, (as set forth in the report,)

which led to the general order for a reinvestigation, were entirely false, so far as Shields was concerned; this is shown by the report, and fully proved by the testimony. No one improved or settled upon the land claimed by him.

7. The report states that Shields "purchased lots of the town authorities." This is an error.

8. Shields withdrew his declaratory statement for the land at Elkhorn, with the consent of the land officers, within the time allowed in many other cases, and according to a practice and precedent established in a great many other cases at that land office. The withdrawal was in time, and is endorsed on the back of the official paper sent up by the land officers. If the withdrawal, which they permitted, required a date, it was their duty to endorse or state it.

404 8. The report on pages 3 and 4 says that "by the parole testimony of J. C. Hileman, it appears that before Shields proved up and made entry he repurchased the house from Beeson, which he had sold him in 1856; but of this there is no record evidence, and nothing is said of the lots sold by Shields, as per doc. F. This sort of 'testimony' (the writer charitably adds in a spirit of impartial justice) "would be inadmissable in any court of law. It is evidence merely of a ruse on the part of Shields to evade the restrictions of the 13th sec. of the act of 1841." Now, Hileman was a witness called in opposition to Shields. He stated the sale to Beeson, and the repurchase back by Shields, in such language as to require the fair inference that Shields repurchased all he sold. Before charging fraud and perjury against Shields for the purpose of forfeiting his estate—blasting the reputation of a poor honest man, and at the same time depriving him of his property—it was reasonable to expect that the writer of this report would examine, with some care, the evidence he was stating in an official form designed to be signed by the Commissioner, for the official action of the head of the department. This was the more desirable, since it seems to have been considered pretty much the turning point in the case. That there was an intention to state this point fairly, I am not disposed or permitted to question, but on examining the evidence, I find that Hileman, though a reluctant witness for Shields, was not the only

405 one who testified to the repurchase. The receiver, in his report to the Commissioner on the re-examination, on this point only referred to Hileman's testimony, and I ascribe this error in the report now under consideration, and many others, to a too close following of the receiver's report, which had been confirmed by the Commissioner, in the former decisions, "for the reasons stated by him in his report or letter."

The other evidence referred to on this point is as follows:

J. C. Johnson, another witness against Shields, after stating that "Shields commenced building a house, or rather an addition to the house on the tract in dispute, about the 1st of September, 1857," and after describing the said new house, and the residence of Shields in it, with his family, &c., in which he denominates the house sold by Shields to Beeson as the "big house," in contradistinction to the new

house, he adds, "Shields obtained the big house from Beeson;" and says that Beeson lived there from July, 1856, till some time in August, 1857.

George Miles, "called for the plaintiff, Omaha," and therefore against Shields, swore that he "conversed with Shields about the house built by him, and then occupied, he thinks, by Beeson, and he desired me to assist him in getting the house back from Beeson. Went with him to see Beeson, but found him absent from home, but went and found him in town, and Shields went and made a bargain with Beeson while witness sat in Shields' buggy, for the pur-
406 chase of the house and lots on the land in question. A day or two after this, Shields told witness he had got the house and lots all right, and was then prepared to prove up; he said something about building a house or an addition, before he should prove up, * * * * and desired me to aid him to pre-empt. Witness did so, and was a witness for him as to the title to the house obtained from Beeson."

This witness was an attorney. I have copied the foregoing from my careful notes of the evidence, which are strictly accurate, though they may not be literal.

George Hepburn, a witness, swears that a notice of Shields' intention to pre-empt was published in a newspaper.

Had not Shields repurchased from Beeson all he sold him, he (Beeson) would of course have resisted Shields pre-empting the land, while the record shows he did not. No question on this point was even made in the receiver's report. There can be no good reason, therefore, to question the repurchase.

9. But the deed made to Beeson, by Shields, was not such a "contract or agreement by which the title which might acquire from the U. States should inure, in whole or in part, to the benefit of any person except himself," as is provided against by the 13th section of the act of 1841. Even if the oath taken by Shields before making his entry were not "conclusive on the land office," according
407 to the circular of the 11th of November, 1843, issued by the Commissioner of the General Land Office, under the direction of Mr. Secretary Spencer, that deed was a mere quit claim or release of his right in the land at that time, which was nothing at all but a naked possession, and in the warranty the title of the United States is expressly excepted; so that by all the authorities, including that of the Supreme Court, any subsequent title Shields might acquire would enure to his own exclusive benefit, and would not pass by the way of estoppel to the benefit of Beeson or his heirs or assigns. The deed to Beeson does not contain the words "heirs" or "assigns," nor "forever," nor any words of inheritance; so that, if Shields had had any title to the land except mere naked possession, (even a fee simple,) this deed would only have passed a life estate. It was known to everybody that the title was in the U. S., and Shields did not claim to have, or to convey, any title, except a possession of U. S. land, with a house and improvement on it. He merely intended to assign his possession and improvement to Beeson; and that was all

Beeson expected to purchase. In other words, he sold his improvements to Beeson, as it is customary among settlers on the public lands. Beeson had no right to a pre-emption in consequence of the improvements bought from Shields; and when Shields returned to the land, after the violence of the claim club had ceased, with
408 the consent of Beeson, having repurchased his own improvements, he made, as before stated, a new improvement, and made the proper declaratory statement, in strict compliance with the pre-emption laws.

The effect of a quit-claim deed is well stated by Chief Justice Shaw in 12 Pickering's R., p. 67, thus: "The grant in the deed is of all the right, title and interest in the land, and not the land itself or any particular estate in the land. The warranty is of the premises, that is of the estate granted, and must be confined to the estate vested. A conveyance of all the right, title and interest in the land is certainly sufficient to pass the land itself, if the party conveying has an estate therein, at the time of the conveyance, but if it passes no estate which is not then passed by the party." To the same effect, see "Rawle on Covenants for Title," p. 421; cites, in addition to the above case, 5 Cushing's R., p. 56; 6 ditto 34; 14 N. H. Reps., 326; 5 Gratton's R., p. 162; 3 McLeans R. N., 78; 27 Maine R., p. 361; and Chief Justice Shaw cites in support of the rule laid down by 7 Wheaton, 452. This rule would fully cover the case if the title of the U. S. had not been excepted in the deed from Shields to Beeson, as it was expressly. (Vid. Doc. F., referred to in the report.) That there is "no estoppel where an after-acquired estate is not included within the covenant," see Rawle on Covenants for Title, p. 417 to 419.

To the general doctrine above laid down, see 11 Howard,
409 p. 325; (18 Curtis, 643;) 2 Hilliard on Real Property, p. 423. See 102 et ult, 2 Hill's R., p. 104; 2 Greenleaf's Cruise on Real Property, title estoppel; and authorities cited in these works. I have prepared a brief, showing that the decisions are uniform, which I shall be glad to present if any doubt exists on so clear a point. I respectfully submit, that it cannot be necessary to await the receipt of a copy of Beeson's conveyance back to Shields in order to confirm Mr. Shields' entry, as suggested by Mr. Slocum.

In answering my first point, as classed in the report, it is admitted that the register and receiver should both have acted under the pre-emption law, and under the instructions from the department; and yet it is sought to excuse the non-performance of the duty, because the parties consented to the withdrawal of an attorney who was either interested or prejudiced in the case, so as to be legally incapable of impartial action. A consent to his withdrawal from the case, in which he was legally disqualified to sit, was not a consent to be bound by the action of the receiver alone. I have shown that consent could not give jurisdiction. The officer should have been dismissed if incapable of performing his duty, as he declared himself, and another appointed. But the report, on this point, says the register and receiver often disagree, and that such disagreement (or

failure to agree) is treated as "a decision against all the parties to the contest," &c. Now, Shields had a decision in his favor,
410 by both the register and receiver, (an impartial register,) and an entry, founded on such decision, and the object of the reinvestigation was, if possible, to reverse that decision, and annul that entry; and, according to the plain and just logic of the report, the decision was adverse to this object; that is, there was no legal decision to annul the former one, and the entry made under it. It would seem too absurd that one officer, who had no authority to decide on the legal rights of a citizen, should yet have ascribed to his authorized decision a power of reversal and annulment of a decision made by two officers who authority to decide; and that, too, in conceded violation both of law and instructions, and conceded legal duty. A tribunal composed of two persons, the action and concurrence of both of whom are necessary to give a right, and who have concurred and given the right, by this new logic, is to be reversed, and the right annulled, by one of the members of that tribunal, who, it is conceded, had no authority to act separately on such right.

But if this action was void, as it manifestly was, then it is contended the 1st sec. of the act of 4th July, 1836, makes the action of the Commissioner valid in the annulment of the entry of Shields; that the receiver alone had the right to take the evidence on the reinvestigation, though not to decide the case; and that the
411 Commissioner could annul the entry upon that evidence, without any decision, opinion, or report even, by the "register and receiver." This is nothing less than to annihilate the power of the register and receiver, where (in whom) the law places it, (for the wisest of reasons when they shall be enquired into,) and vest it in the Commissioner.

I can find no precedent, law, or reason for such a novel doctrine.

But the Commissioner did not undertake to act independently of the receiver's opinion, and to decide the case upon matters of law. The language of his decision is, that he has "examined all the testimony and arguments, and that he concurs with the receiver in opinion, that the entry of Shields is illegal and ought to be cancelled, for the reasons which are very clearly set forth in the receiver's letter;" acting precisely as he would upon a report by the "register and receiver." Now, by the law, Shields had a right to the judgment of the register, on every fact and every question of law that arose upon the reinvestigation; and to the report of the register in connection with the receiver, upon his case. Of this he has been illegally deprived. The register, for example, knew when the declaratory statement for the land at Elkhorn was withdrawn; the receiver, who does not keep the records, did not. Many other similar reasons might be stated.

The report says "we claim the power, under the 1st sec. of the act of 4th July, 1836, to supervise and control the original
412 action of the register and receiver;" * * * that that power is incident to the duty of the Commissioner, under the 1st section of the act of July 4th, 1836.

I have shown that this act confers precisely the same powers upon the Commissioner as the act of 1812, creating that office, and none other; and that it merely transferred the authority to direct the Commissioner in the performance of his legal duties as the head of the Land Office from the Secretary of the Treasury to the President. That the act of '36 only authorized the Commissioner to perform such "executive duties" as had been "prescribed by law" previous to its passage, or as might thereafter be prescribed by law. "Now (already) prescribed, or which may hereafter be prescribed by law," is the language of the 1st section of the act of 4th July, 1836; and no lawyer, or man of common sense, who understands plain English, can, on careful examination, (it seems to me,) say that this language confers any new power upon the Commissioner. "Now prescribed by law" necessarily means something already prescribed by law, and "hereafter be prescribed by law," no more plainly means something to be prescribed subsequent to the act in which this language is used.

The careless remark of Judge Catron, in the case of Barnard and Ashley, quoted by me, and seized upon with such wonderful
413 avidity in the report, is a mere abiter dictum, and very clearly an error, and is much weakened by the remark of the judge, that "if the construction of the act of 1836 to this effect were doubtful, the practice under it, for nearly twenty years, could not be disturbed without manifest impropriety." The practice to which Judge Catron thus alludes and commends is stated thus by him in the same case, viz: "In cases, however, like the one before us, where an entry had been allowed on ex-parte affidavits which were impeached, and the land claimed by another founded on an opposing entry, the course pursued at the General Land Office was to return the proofs and allegations in opposition to the entry to the district office, with instructions to call all the parties before the register and receiver, with a view of instituting an inquiry into the matters charged, allowing each party, on due notice, an opportunity of cross-examining the witnesses of the other, each being allowed to introduce proofs; and on the close of the investigation, the register and receiver were instructed to report the proceeding to the General Land Office, with their opinion as to the effect of the proofs, and the case made by the additional testimony. And on this return the Commissioner does, in fact, exercise a supervision over the acts of the register and receiver. This power of revision is exercised by virtue of the act of July 4th, 1836, sec. 1st." Then follows the remarks as to the power given by that act to the Commissioner, and an appeal to the
414 authority of the practice thus stated, if the act does not bear the construction placed upon it.

Nothing can be clearer than the fact that the action in Shields' case is in open violation of this decision, and of the practice under the act of 1836, which the judge lays down as having prevailed under it "for nearly 20 years," and which he thinks could not be disturbed without manifest impropriety.

1. The practice stated by Judge Catron is confined by his deci-

sion to cases where the land is "claimed by another founded on an opposing entry," (precisely like the cases arising under the 11th section of the act of 1841, where that act expressly gives an appeal and the power of supervision,) and this is not such a case, and is, therefore, not within, but opposed to the decision and 20 years' practice.

2. The parties were not called before "the register and receiver," but only before the receiver alone, in violation of the practice stated by the judge, and of all other practice; nor were the "investigation and inquiry into the matters charged" made by "the register and receiver," the officers appointed by the law to take the proofs.

3. Nor did "the register and receiver" at "the close of the investigation" report the proceeding to the General Land Office, with their opinion as to the effect of the proof, and the case made by the additional testimony." In a word, this decision, which is the
415 only authority adduced to support the irregularity of the proceedings in Shields' case, has been departed from in every particular.

All the power claimed for the Commissioner, by this decision under the act of 1836, is expressly given to him. I repeat, by the 11th section of the act of 1841, hence there is no necessity or legal propriety in claiming that power, in the class of cases named therein, under the act of 1836, as Congress has thus, by express legislation of a later date than the act of 1836, limited the power claimed by this decision for the Commissioner under the last-named act to the cases named in the said decision, viz., (in the language of the decision,) "to cases where the land is claimed by another, founded on an opposing entry," and (in the language of the said 11th section of the act of 1841) "where two or more persons shall have settled on the same quarter section of land," and contest the right, in which case a supervision by appeal is given. Beyond this there is no authority to depart from the rules laid down by President Jackson, and his Attorney Gen'l and Sect'y of the Treasury. Whatever power was given to the Commissioner by the 1st section of the act of 1836, was made subject to the direction of the President; and the rules promulgated by him, President Jackson, a few days before the law was passed, and to sanction which the law was probably passed, have stood,
416 and been printed and promulgated, and been generally observed, as the President's directions. These directions embrace every qualification that can be legally applied to cases not arising under the 11th sect. of the act of 1841, and are the legal measures of the Commissioner's powers, as directed by the President, according to the act of 1836. Those directions being the directions of the President of the United States, and his only directions on the subject, and being strictly applicable to the subject, because the act of 1841 gives the same power to the register and receiver as the acts of 1830 and 1834, under which those directions were given, (with the simple exception of cases, where "two or more persons" settle "on the same quarter section of land," in which an appeal is expressly given by the 11th section,) must govern the Commissioner

without reference to the date when they were promulgated, and, till altered, are as binding as a statue. Those directions, moreover, were sanctioned both by the Secretary of the Treasury and the Attorney General, as well as by the President; and they define, with decision, the legal effect and operation to be given to the action and decision of the register and receiver under the pre-emption laws, and the power of the Commissioner of the General Land Office over them, and the manner in which that power is to be exercised; and
417 no power can be legally claimed for him under the act of 1836, to be received by him in violation of these standing directions of the President. I have shown in my argument that these directions do not justify the action of the Commissioner in Shields' case.

☞Again, the Secretary of the Interior has no appelate power under the pre-emptive laws, except in cases arising under the 11 section of the act of 1841, viz: "when two or more persons shall have settled on the same quarter section of land." In all other cases the Commissioner is to exercise his executive duties, "under the direction of the President of the United States," and not of the Secretary of the Interior. The report made to you in this case claims the most unlimited power for the Commissioner, and disregards, as you will see, many principles considered as settled, with reference to pre-emption cases; ungranted powers are claimed as "incidental" to other granted powers, while Congress, in the act of 1836, reorganizing the General Land Office, expressly transferred the authority of directing the Commissioner from the Secretary to the President, and the act of 1841 limits the appelate power of the Secretary to a single class of cases, (of which Shields' case is not one;) the directions of the President are passed by in this report without notice, and the only relief conceded, in cases not of that class, is an appeal
418 to the Secretary of the Interior. It claims for the Commissioner the arbitrary right to annul entries, even before the right of appeal is exercised, and when the President's directions to the Commissioner deny to him even the right to suspend the patent, and in cases where such suspension would be the only legal and proper remedy. It claims a legal right for the corporate authorities of the city of Omaha (the successors of the Claim Club) to appear as a contestant, where they have no legal claim or right, and where they do not claim any right, and where no citizen of that place has, or pretends to have, any legal claim, and where there are no other claimants or occupants of the land in controversy, except Shields. It claims "an executive privilege, in re-investigating pre-emption cases, to admit parties to the record as witnesses for the government." It repudiates evidence in favor of the claimant, (though drawn from an opposing government witness,) because not strictly admissable to a court of law, and, as against the claimant and in favor of the government, it declares that "the strict rules of evidence observed in courts cannot be followed, for obvious reasons." It claims that "the adjudication" (a word which ex vi termini signifies a judicial act) "of pre-emption claim by the register and receiver is an executive duty, and nothing else." It claims that under the denomination of

"executive duties," in the act of 1836, Congress intended to
419 confer the judicial power upon the General Land Office, at least so far as the forfeiture of the land is concerned, under the 13th section of the act of 1841, in opposition to the opinion an circular issued by Secretary Spencer, (the ablest jurist who has presided in the Treasury since Alexander Hamilton,) under date of the 11th of November of 1843. This circular, though cited by me, is not noticed in the report; but on the contrary, in defiance of this circular, which directly and explicity denies the power claimed, the report affirms its exercise "ever since the passage of the law of 1841." The only authority for this bold assertion is a single letter dated 11th July, 1856, written by the late Dr. Frailey, and signed by Secretary McLelland, and which by no means sustains the assertion based upon it. If the Secretary has the judicial and constitutional power to declare a forfeiture of the property of a citizen "without due process of law," why not to deprive him of his liberty by punishing for perjury, as the said 13th section provides? Both liberty and property are equally protected by the Constitution, which says "no man shall be deprived of eith without due process of law." If the Secretary can perform "due process of law" in one case he can in the other. This report thus makes a judicial act by the register and receiver (that of adjudicating pre-emption claims) "an executive
420 duty," and it converts what the statute defines as an "executive duty" of the Commissioner into a judicial power." And finally this report claims that "the whole pre-emption system is by law lodged in the General Land Office, subject to the direction of the Secretary of the Interior and the President of the United States," making the register and receiver, who are made by law the sole judges of the facts which entitle a claimant to pre-emption, and the courts whose duty it is to enforce the penalties and forfeitures of the pre-emption laws, mere ciphers. No one knows better than the present Acting Commissioner the necessity of adhering to legal rules and established principles, and the confusion and injustice which must follow a departure from them. I contended, in my argument, upon what I supposed to be well established principles of legal construction, that if the power given to the register and receiver by the act of 1830 had been modified by the later act of 1836, the still later act of 1841 (which re-enacted in totidem verbis the act of 1830, as to the power of register and receiver) would restore their power and make it precisely the same as it was under the act of 1830; upon the principle that the last enactment or statute repeals whatever is inconsistent with it in a former enactment. This principle of
421 law is recognized and enforced in the report, to make the act of 1836 modify the act of 1830; but when the application of the same principle to the act of 1841 is invoked, the report passes the point in silence. I hold clearly that the act of 1836 did not modify the power of the register and receiver, or the legal effect of their decisions under the act of 1830; but if it did, the act of 1836 is itself so far repealed by the act of 1841.

11. In answer to the 4th point of my argument, the report ex-

presses the opinion that it is "too late to object to the illegallity and injustice of permitting the corporate authorities of Omaha to contest the right of Shields, the said city not being a legal contestant under the act of 1841. To this I reply that there is no statute of limitations or practice of the department to deprive the claimant of a legal objection before his case is finally decided.

12. The report misapprehends my 4th point, and thus finds a plausible answer to an objection not made by me. My point was not that the receiver could not examine the witnesses, (though the claimant had the legal right in every question that arose to the judgment of both the land officers,) but that the receiver alone had no authority to act and decide and report on the evidence taken on the rehearing of the case, any more than he had to act alone on the first
422 hearing, but that under the law, and by the instruction of the Commissioner, in his letter directing such rehearing, the register and receiver were both required to act; and that a decision or report by the receiver alone was unauthorized, illegal and void, and did not lay a legal foundation for the action of the Commisioner and the cancellation of the entry, even if he had the authority on a proper rehearing to do so.

13. In answering my 6th point, the report, in commenting upon the effect of the decision of the Supreme Court in the case of Barnard and Ashley, says: "So far from deciding or intimating that the 'supervision and control' conferred on the Commissioner by the act of 1836 is confined to contested cases, or cases where there are two or more claimants to the same tract of land, the court instances ex-parte cases, as those where the 'supervision and control' is (are) palpably necessary." The language of the court is as follows: "In cases, however, like the one before us, where an entry has been allowed on ex-parte affidavits, not ex-parte cases, which were impeached, and the land claimed by another founded on an opposing entry, the course pursued at the General Land Office was," &c., &c. The court was therefore certainly speaking of "contested cases" alone in which ex-parte affidavits, and it speaks of none other,
423 and commends the practice of "revision and control" in none other; and the inference that ex-parte affidavits were never taken in contested cases, and therefore that the court, in speaking of ex-parte affidavits, referred to ex-parte cases, is erroneous. The ex-parte affidavits spoken of by the decision are those to prove "cultivation and possession," questions within the special and peculiar jurisdiction of the register and receiver by the act of Congress.

14. The charge of false swearing made against Shields is totally unsupported by evidence, (having no foundation but the quit claim already explained,) and is as ungenerous as it is unjust. If he swore falsely, why is he not prosecuted for perjury, which is the legal mode of inflicting the penalties for that crime, and not by executive usurpation. So of the charge of "carelessness and ignorance" against land officers, for which the executive is alone to blame, and the proper remedy removal from office, and the appointment of competent, honest men, like John A. Parker, by whom Shields' entry was allowed.

15. The charge in the report that I "quoted only so much of the decision (in 9 Howard) as suited my purposes, leaving out some very material provisos," is a very gross error. The sentence succeeding the one which I quoted, and which is quoted in the report, as quallifiying what I quoted, contains simply what is conceded over and over again in my argument.

424 My 6th point was, as abridged in the report, "that, by the 12th section of the act of 1841, the register and receiver are constituted the sole judges of the facts which entitle a settler to pre-emption, and their decision (on the facts, of course) is not subject to the revision of any other officer of the government, and especially that their decision cannot be affected by the action of the receiver alone," &c. This is my point, as briefly stated in the report under consideration. In all my arguments, and in the authorities I cited in support of this point, I conceded that to make the decision of the register and receiver final on the "facts" of the case, they must have proceeded in the manner prescribed by the law and by the instructions under it. I quoted the statute which declared this, and the directions of President Jackson which affirmed it, and in a word conceded it in every way, and merely contended that when they had so proceeded, their decision upon the facts and weight of evidence was final under the law, as declared by the President's directions and the Att'y General.

This is all the omitted sentence of the decision which I am thus charged with unfairness for not quoting alleges. There was no pretence in this case that the register and receiver had not proceeded in the manner prescribed in the law, and also in the instructions

425 under it. The sentence which was not quoted simply affirmed that when they did so proceed, their decision "must be considered final," and this is all I have contended on this point, though there is a seeming effort to describe a different doctrine, and then to answer it.

16. The report supposes that the register and receiver should neglect the rules prescribed for his government, and then asks what what would be the remedy? I answer, in a case of joint settlement on the same quarter section, an appeal, as provided by the 11th sec. of the act of 1841, and in other cases, the course directed by President Jackson. This is the only course consistent with the law. The report claims that cancellation, as a "high executive duty," is the only remedy to be exercised according to a "common-sense interpretation of the law."

17. In answer to my 8th point, which charges "gross partiality" by the receiver in excluding material testimony for Shields and otherwise, the report pronounces it a point "of no practical importance," because it affirms the decision against him was made on "record evidence." That evidence which the report admits was not considered in making the decision because, being thus excluded, it could only be presented by ex-parte affidavits, would have shown beyond all

426 possible doubt that Shields was prevented by the unlawful and bloody violence of the Claim Club, and the well-grounded fear of

his own life and that of his family, from proceeding to make his pre-emption claim before the fall of 1857, when he did make it, on a new compliance with the pre-emption laws; it would also have shown a reason consistent with the most perfect good faith why he sold his improvements to Beeson, viz., that owing to the terror and violence of said club he could not exercise his pre-emption privilege where he desired and was entitled to it, to wit, within the assumed jurisdiction of said club. No one who read this evidence, with the other evidence in the case, can doubt that but for this club Shields would have complied with the pre-emption law in all respects, and have made his entry as soon as the land office was opened. This was his interert as well as his legal right, of which he was for a long time thus deprived. The comparative value between an entry adjoining the city of Omaha and one at Elkhorn, whither he went to escape the jurisdiction of said club, show a disposition to submit to an inevitable sacrifice rather than a spirit of speculation, which the report injustly infers.

It is most ungracious in a government which neglected to protect its citizens in the enjoyment of their legal rights from open vio-
427 lence to seek, after formal and technical objections resulting from that violence, to forfeit substantial legal rights. Let the just principles that have been applied to the case of George Smith (whose compliance with the law was prevented by the same club, whose treatment, with the still more violent treatment of many others, was enough to account for and justify the cause of Shields,) be applied to the case of Shields, as they should be, and there could be no difficulty, even if he had not complied anew with the requirements of the pre-emption laws, after the violence of the said club had abated.

To the question asked in the report for the purpose of showing that the conceded terrors and violence of the club had no effect upon Shields, viz: "Why was it (the club) so lenient to Beeson, his (Shields') assignee?" I answer, because he never made any attempt, or showed any disposition to pre-empt, or violate their "club law." This reason should have been very obvious to the writer of this report, as doubtless it was, in which case the question becomes an index of the difficulty of the writer to find even a plausible excuse to justify the former decision prepared for the Commissioner, who has requested the reconsideration of that decision.

18. It is said "the record evidence in the case is sufficient
428 to justify the former decision." That "record evidence" is the aforesaid quit-claim deed, containing an express exception of the title of the U. S., which I have shown in no manner violated the 13th sec. of the act of 1841, being a mere assignment of his improvements, which he has since repurchased, and the declaratory statement for another tract, while the Claim Club was yet in full operation, endorsed as having been made by mistake, and which was withdrawn by the consent of the district land officers, (and not at his "own option," as alleged in the report,) according to a practice applied to many other cases, and sanctioned when done within three months, as in this case, by the department, of which on my inquiry

evidence has been exhibited to me at the pre-emption bureau. The 4th section of the act of 1843, and the circular of Dec. 3d, 1856, are referred to, at the close of the report, to show that no authority has been given to a pre-emptor to withdraw one declaratory statement, at his own option, and file another, &c. To this I have to reply: (1) If this were the general rule, the extraordinary circumstances of Shields' case should make it an exception, like that of George Smith. (2.) The rule, as I have above stated, is not general. (3.) The 4th section of the act of 1843, (March 3d) does not embrace this case.

☞The general circular under this act, dated 8th May, 1843, is
429 founded on a true construction of the act. It is as follows, viz:

"The fourth section declares it unlawful for an individual who has once filed a declaration for one tract of land, to file at any future time a second declaration for another tract. This has reference to those required under the 15 section of the act of 1841, for the land subject at the time of settlement to entry at private sale," which the land in this case was not. (4.) The word "once" in the above instruction, is an interlopation, which would make the prohibition general, where it was applicable; and also make its application prospective; but there is no such word in the act, and its legal operation is entirely retrospective—i.e. it applies only to filings made before the act of 1843. The language of the 4 section is as follows: "That where an individual has filed under the late pre-emption law (1841) his declaration," &c. The very next section of this act (and many other sections in the acts of 1841 and 1843) shows that when Congress intended to refer to events to occur after the date of the law, they used language appropriate to such intention. Had Congress intended to embrace future cases, arising not "under the late pre-emption law" alone, but also under that law, (1843,) the language would have been, "that where an individual has filed," or shall hereafter file, or shall file, or shall have filed, &c. The words, "late pre-emption law," are
430 legally inappropriate to embrace declarations filed after the passage of the new law, for such a filing would not be under the late law alone, but under both laws—but under the present law also.

The legal authorities on this point are uniform, and will be adduced, if desired; and the grammatical construction and meaning are indisputable. The Supreme Court placed this construction on the words, "has been sold," in a late case, 18 How., 173. (5.) The only effect of not making the declaratory statement in the time specified, even under the 5 section of the act of 1843, (which does apply to unproclaimed land,) is that the right of priority of purchase is forfeited, "and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice, and otherwise complied with the conditions of the law." The land is not withdrawn from sale by pre-emption; and if there is no other settler on it, undoubtedly the first settler may still take it. At any rate, he may make a new and independent settlement on the same land—make the declaratory statement within the proper time from the date of such new settlement, and claim the land by pre-emption.

The circular or letter of the Commissioner of the 3d of Dec., 1856, referred to in the report, was a new and erroneous construction of the 4 section of the act of 1843; and, besides, this case does not
431 fall within its apparent purpose. At any rate, the general circular of the 8 of May, 1843, made contemporaneously with the passage of the act, when its objects and purposes were best understood, is in accordance with the legal construction, and undoubted intention of Congress, as evinced by the 9 section of that act.

19. The report says the statement of B. R. Folsom, showing "the speculative propensities" of Shields, and that of J. C. Johnson, who says he "heard Shields say he had employed a man to prove up for him at Elkhorn," were not noticed in making the former decision. To which I reply, the pre-emption laws have not vested such inquisitorial powers in the Commissioner as to authorize an enquiry into the "propensities" of claimants. (2.) That if Shields made any such remark as Johnson says he heard, it amounts to nothing, legally, and must have been made when Shields supposed the Claim Club would never permit him to pre-empt his first settlement, and have reference to the employment of a witness who knew of his improvement at Elkhorn, to go to the land office with him. The proof shows that he had made such settlement and improvement there as would have entitled him, honestly, to a pre-emption, if the club had continued in power. It also shows that the land at Elkhorn was abandoned by Shields as soon as the power of the club waned, under the
432 influence of a more wholesome public opinion, and that the land was claimed and entered by a subsequent settler; and there is not a particle of evidence, and not even an allegation, that Shields has any interest whatever in that land. If he had even had any such interest, it would have been [been] proved in the inquisitorial proceeding before the receiver by the minions of the club, and the scription claimants and speculators who were there called to testify against him, under the auspices of the city authorities of Omaha, the successors of the said Claim Club and its interests, which have been diffused everywhere, even among senators and representatives in Congress, as the papers in this case show, to crush the honest claims of pre-emptors, who, as honest citizens, refused to enter into the corrupt league of the "Omaha City Company." (See the memorial of the mayor and city council to the Commissioner, in which this corruption and violation of the pre-emption laws are confessed; and also the letter of sundry members and senators, referred to in the Commissioner's letter, ordering the re-investigation of this and other cases; copies of which were handed with my argument, I believe.)

It is enough to make the blood of an honest man boil to read an account of the persecutions and humiliations to which Shields
433 was subjected, even in August and September, 1857, in his attempts to secure his legal pre-emption rights; but I appeal to the evidence to show that no one of the interested speculators when put on the stand, with every motive of interest to stimulate them, was able even to swear (much less show) a single "contract or agreement" in violation of the 13 sect. of the act of 1841. No-

thing can be more humiliating to every lover of free government, and of "law and order," than the painful ordeal through which Shields passed, and to know that the officers of the great government, as Mr. Parker swears in the case of George Smith, were unable, for more than an entire year, to protect the rights of honest citizens, or to execute the laws. If, under this terrible pressure, Shields is sometimes shown to have prevaricated towards his pursuers, it was but from the necessity of "fighting the devil with fire." The powerful efforts since made, and now making, to break down the entry, which his own perseverance and the firmness of the late register finally enabled him to effect, are but a part of the same system of lawless persecution; and it is not to be wondered at that he has, at a comparative sacrifice of his property, for his own peace and that of his family, again sought safety at his old home at Elkhorn, beyond its influence.

434 It is for you to decide on this review, whether the executive department shall be made the instrument of finally consummating this persecution, violence, and injustice, and giving them, in the future, the sanction and prestige of success.

Washington, 17 Sept., 1859.

CHARLES E. SHERMAN,
Attorney for R. Shields.

435 This indenture, made and entered into this 22d day of September, A. D. one thousand eight hundred and fifty-7, between Thomas Hawes, of in the county of Sarpey, and Territory of Nebraska, of the first part, and William W. Willingham, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of two hundred and fifty dollars current money of the United States, to me in hand paid by the said part of the second, at and before the ensealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have granted, bargained, sold, aliened, remised, released, and confirmed, and by these presents do fully grant, bargain, sell, alien, remise, release, and confirm unto the said party of the second part, and his heirs and assigns forever, all that certain piece or parcel of land lying and being in in the county of Sarpey, and Teritory of Nebraska, and more particularly described and known as follows, to wit:

The southeast quarter of section ten, (10,) in township thirteen, (13,) north of range ten, (10,) east of the 6 principal meridian, in Nebraska Territory, together with all and singular the hereditaments and appurtenances whatsoever to the said premises belonging or in anywise appertaining, and the reversion and
436 reversions, remainder and remainders, rents, issues, and profits thereof, and of every part and parcel thereof, and also all the estate, right, interest, property, possession, claim, and demand whatsoever of the party of the first part, his heirs and assigns, in and to the same or any part or parcel thereof; to have and to hold the same, with the same, with the appurtenances, unto the said party of the second part, his heirs and assigns, in fee simple forever. And the

said party of the first part and his heirs do hereby covenant and agree to and with the said party of the second part and his heirs and assigns, that I am now the owner of the said premises, and am well seized of a good and indefeasable estate of inheritance therein, and I have full right and power to sell and convey the same in fee simple absolute; that the said premises are free and clear of all incumbrances; that the said party of the second part, his heirs and assigns, may forever hereafter have, hold, possess, and enjoy the same without any suit, molestation, or interruption by any person whatsoever lawfully claiming any right therein. And the said part of the first part, and all persons claiming under, will at any time hereafter, at the request and expense of the said party of the second part, his heirs and assigns, make all such further assurances
437 for the more effectual conveyance of the said premises, with the appurtenances, as may be reasonably required by him or them, and that the said part, heirs, executors and administrators, will warrant and defend the said premises, with the appurtenances, unto the said party of the second part, and heirs and assigns, forever.

In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

THOMAS his × mark HAWES.

Signed, sealed, and delivered in the presence of—
A. MACON.
SAMUEL B. MCCUNE.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

On this 22d day of September, A. D. 1857, before a notary public in and for said county, personally appeared the above-named Thomas Hawes, known to me to be the identical person whose name is affixed to the foregoing instrument as grantee, and acknowledges the same to be his voluntary act and deed.

[SEAL.] AUGUSTUS MACON,
Notary Public, Douglas Co., N. T.

Filed for record March 16, 1858, at 9 o'c. a. m.
C. D. KELLER, *Co. Register.*

438 TERRITORY OF NEBRASKA, *County of Sarpey*:

I, C. D. Keller, co. register in and for said county, do hereby certify that the foregoing is a correct copy of a deed on record in Book B, page 382 and 383, of co. records of Sharpey co., N. T.

C. D. KELLER,
Co. Register of Sarpey Co., N. T.

WASHINGTON, D. C., *Dec.* 21*st*, 1858.

DEAR SIR: Please send by my messenger the papers I filed with you yesterday. I desire to make some corrections in the argument.

Yours, truly,

F. BIGGER.

Joseph Wilson, esq.

Endorsed: E. 65,421. Washington, Dec. 21, 1858. F. Bigger asks for the papers filed in pre-emption case, Robert Shields *vs.* Omaha City. J. W. True. Papers returned on Dec. 21, '58. R. 7,178. Allan. Dec. 21, '58.

439 WASHINGTON, 10*th April*, 1859.

SIR: I will thank you for a copy of your letter of the 6th March, 1858, to the register and receiver of Omaha, N. T., directing the said register and receiver to investigate and report upon the pre-emption entry of Robert Shields, and others. Also a copy of your letter to the same officers of 12th of January, 1859, containing your decision in the case of the said Robert Shields.

I am examining the said case for claimant, Shields, and require a copy of s'd letters for that purpose.

Respectfully, your ob't servant,

CHARLES E. SHERMAN,
For ROBERT SHIELDS.

Hon. Thos. A. Hendricks, General Land Office.

Endorsed: E. 81,958. Washington, April 11, '59. Chas. E. Sherman wishes a copy of the letter of 6th March, 1858, directing the reg. and rec'r to investigate and report the pre-emption entry of Robert Shields *et al.* An's'd April 14th, 1859. April 12, 1859. R. 7,362. Allan.

440 WASHINGTON, D. C., *January* 24, 1862.

Hon. Caleb Smith, Secretary of the Interior:

SIR: In the matter of the claim of Gilbert C. Howell, esq., to the W. ½ of the SW. ¼ of sec. 10, T. 15 N. R. 13 E., 6, p. m., per Omaha, N. T., cert. 1,404, contested by Robert Shields, an alleged pre-emptor, whose entry per cert. 996, which had been vacated, was reinstated by authority of your decision of the 13th ult., I respectfully ask the favor of you to instruct the Commissioner of the General Land Office to withhold the patent on Shields' entry until Mr. Morrell can have an opportunity to file an argument for a reconsideration and evidence, showing the fraudulent character of Shields' claim and the justice of his own. I am told that Shields' cert. has been filed for patenting. Only a reasonable delay is asked for.

Morrell alleges that no notice of the suspension of his entry was sent to the local land office, or to him; that the papers in the matter

of vacating Shields' entry have mysteriously disappeared from the local land office, and that fraud can be proved in the case, in which the local land office participated.

A caveat has been filed by Morrell in the General Land Office against the issuance of a patent on Shields' entry, but the Land
441 Office refuses to recognize it.

Morrell declares that he has sold the land to different individuals in good faith, and expensive improvements have been made by some of the purchasers, and the decision as it now stands affects other entries, and several hundred thousand dollars will be perilled thereby.

Very respectfully, your ob't servant,

R. T. MORSELL,
Att'y for G. C. Morrell.

Endorsed: F. 92,327. R. T. Morsell, att'y for G. C. Morrell, desires Secretary to instruct Com'r Gen. Land Office to withhold the patent in Shields' case until Morrell can file an argument showing the fraudulent character of Shields' claim and justice of his own in which fraud he claims the local land officers participated. Submitted to the Sec'y for directions as to the disposition to be made of the same. A letter from Mr. Morrell was handed some days since on the same subject. Jan. 25, 1862. Let the issue of patent be suspended for present. C. B. Smith. M. Beard, Ive. 20. 1,133.

442 WASHINGTON, 19th *Sept.*, 1859.

Jos. S. Wilson, esq., Act'g Com'r Gen. Land Office:

SIR: As you seemed to be waiting, when I was at the Land Office on Thursday last, for some response from me to the report rec'd from the pre-emption bureau, in the case of Robert Shields, I commenced on my return home what I at first intended as a mere memorandum, as its heading imports, of the points of objection to that report; it has grown to a length not anticipated, and yet will not supercede the necessity of your reading my former arguments, on every point of which I rely. The only apology I can make for the unexpected length of my present paper is, that the writer of the report seems to have been governed by a rule said to have been given by Luther Martin to one of his students for the government of his practice, and as most likely to result in his success, viz: "To deny everything and admit nothing to the opposite side of the cause."

It is due to Mr. Slocum to say that since preparing the report he has candidly admitted that if Mr. Shields repurchased his improvements from Beeson, that is, repurchased what he sold Beeson, he is equitably entitled to have his entry confirmed. I think I have conclusively shown in the paper now handed that the supposed
443 objection founded on the sale is without any valid foundation under the pre-emption laws, and that there is no cause for further delay for that purpose. On reading my argument in the case, I hope you may find it unnecessary to read the paper now handed; if

any doubts, however, are created in your mind by the report, I trust the paper now handed will be found to contain a fair and candid and conclusive reply to every point of it, material and immaterial, and in every respect to sustain my argument.

I hand a printed paper containing the affidavit of John A. Parker, esq., the late register at Omaha, (in the case of George Smith,) by whom the entry of Shields was fully sanctioned; and which printed copy I am informed at the pre-emption bureau is true.

Very respectfully, your ob't servant,

CHARLES E. SHERMAN,
Att'y for Shields.

Exhibit A.—John A. Parker's affidavit.

Vid. pp. 10, 11 and 12., in the case of Geo. Smith, who applies to enter by pre-emption at the land office at Omaha, Nebraska Territory, the E. ½ of the SW. and W. ½ of the SE. ¼ of section 10, T. 15, in N. R. 13 E.

John A. Parker, late register of the land office at Omaha, being duly sworn, testifies as follows :

That he was present in Omaha in May, 1856, at which time
444 the said Geo. Smith had erected a house on the above-described land, and which was the only house or other improvement on said land; that soon after said house was erected on said land, he saw a large and excited mob, fully armed, proceed to said house and pull the same down, and gave notice to said Smith to leave the Territory immediately, under pain of being placed in the river if he failed to do so; that the said Smith did. in fact, leave. On or about 1st February, 1857, the land office opened at Omaha, and the "Claim Association" held a meeting, and passed resolutions that no man should be permitted to pre-empt land without the consent of said association; and a committee of vigilance was appointed to see that no person violated said resolution, and to punish and "dispose of" all who did make any effort to comply with the laws of the United States. Some were summarily dealt with; have not since been heard of; an effort was made to find Smith, for the purpose of making him abandon his claim, and it is within the personal knowledge of this affiant that threats were made; if he could be found and refused to comply, he should be hung; and the affiant has no doubt said threats would have been executed. Some time in April, the said Smith wrote to this affiant, asking if he could, in his opinion, safely appear at his
445 office to consummate his pre-emption. He replied that he did not think he could do so, and any attempt on his part would forfeit his life. Again, in the summer he was written to on the same subject; and he was then advised to come down to the office at night, and bring his witnesses with him, so that the facts should be sent to the Commissioner of the Land Office, all of which was done.

During the whole period there was no bona-fide settlement on said lands, nor was there any such settlement up to the time said Smith

came to the office. The only real claimant of the land was "Omaha," and it constituted a portion of the 3,500 acres which was set apart and claimed for the town, but constituted no part of the area entered or "built on and occupied for town purposes." It does not appear that there was any laches on the part of Smith, nor was there any law in existence to which he could appeal to place him in possession of the land (even if such law could be enforced against a mob.) The legislature at its session of 1867 had repealed all civil and criminal laws and not substituted any others.

This affiant is in doubt whether at this time the said Smith could safely enter on the land; but if it is entrusted to him he has no doubt he will make the effort.

JOHN A. PARKER,
Late Register Land Office, Omaha, N. T.

446 Subscribed and sworn to before me, a justice of the peace for and in the county of Washington, and District of Columbia, as witness my hand 16 March, 1858.

J. A. GODDARD, *J. P.*

Resolved, That persons shielding themselves under the act of Congress to pre-empt a man's farm under the color of law, shall be no excuse for the offender, but he will be treated by us any other common thief.

Endorsed: F. 2,972. Charles E. Sherman, Washington, D. C., 19th Sept., 1859. Enclosed argument in support of pre-emption claim of Robert Shields. Sept. 19, 1859. R. J., J. S. W.

447 OFFICE OF BYRON REED, REAL ESTATE AGENT,
Omaha, Neb., Jan'y 4, 1862.

Com. Gen. Land Office, Washington, D. C.:

Sir: Herewith please find affidavit impeaching the pre-emption of Robert Shields; I request that the patent of Shields be witheld until an investigation of the case can be had.

Very respectfully,

BYRON REED.

In the matter of the pre-emption claim of Robert Shields to the west half of the southwest quarter of section ten, and the north half of the northwest quarter of section fifteen, in township fifteen north of range thirteen east, in the Omaha land district, N. T.

Evert V. Smith, being duly sworn deposes and says, that the entry of the said Robert Shields of the above-mentioned land, made on the 21st day of November, 1867, was illegal and fraudulent, and this affiant would state the following facts in support of the above charge:

The said Shields had enjoyed the benefit of the pre-emption law of 1841, prior to the time he made proof and payment for the land above-mentioned.

448 After the said entry was cancelled by order of the Commissioner, the said Shields admitted to divers persons that his said entry was illegal and fraudulent.

After the said entry was cancelled as aforesaid, the then register of the land office at Omaha, one John A. Parker, jr., admitted to divers persons that the said entry was illegal and fraudulent, and boasted that he, acting as the attorney of the said Shields, procured the said entry to be made, knowing it to be fraudulent.

On the day the said Shields made the said pre-emption, this affiant charges that he said Shields entered into an agreement or contract with the firm of Cassady and Test, whereby the title he might acquire from the United States should inure in whole or in part to the said Cassady and Test.

And this affiant charges that said Shields sold and conveyed all his interest in said pre-emption, and abandoned and left the same long before the said entry was cancelled as aforesaid, and that he has not resided thereon since.

E. V. SMITH.

Sworn to and subscribed before me, a notary public in and for Douglas county, N. T., this third day of January, A. D. 1862.

[SEAL.] BYRON REED, *Notary Public.*

449 Endorsed: F. 91,574. Omaha, Neb., Jan'y 4. 1862. Byron Reed files affidavit of E. V. Smith, impeaching the pre-emption right of Robert Shields, and requests patent to be withheld, &c. Received at the Gen. Land Office, Washington, D. C., Jan. 15, 1862. Answer Jan. 16, 1862. 1, 125.

U. S. LAND OFFICE, OMAHA, N. T.,
January 13th, 1862.

Hon. J. M. Edmunds, Com. Gen. Land Office, Washington, D. C.:

SIR: In obedience to your letter of 18th December, 1861, I have informed E. V. Smith, and Gilbert C. Monell of the decision of the Secretary of the Interior in the case of Robert Shields' pre-emption: I have also directed them to apply for a return of their purchase money, and have entered a cancellation of their entries on the books of this office.

Omaha city, N. T., Jan. 14, 1862.

Respectfully,

EDWARD B. TAYLOR, *Register.*

Endorsed: F. 92,066. U. S. Land Office, Omaha, N. T., Jan. 13, 1862. Edward B. Taylor, register. In reference to the pre-emption of Robert Shields. No answer required. Received at the Gen. Land Office, Washington, D. C., Jan. 22, 1862. Pre. D. 1, 129.

450 OMAHA, N. T., *Jan.* 16, 1862.

Hon. J. M. Edmunds, Com. Land Office, Washington, D. C.:

SIR: In the case of a recent decision of the Hon. C. B. Smith, setting aside a public sale of the west $\frac{1}{2}$ of SW. $\frac{1}{4}$ of section 10, towns. 15, R. 13, and directing a patent therein to issue to Robert Shields, I respectfully appeal from such decision to the proper place to carry

such an appeal. I was purchaser of the 80 acres above specified, as will be seen by Omaha city, Nebraska, certificate No. 1,404.

Having paid for the land in good faith, and never having received any notice whatever of the other party objecting to such sale, I must formally protest against the ex-parte decision just rendered, and claim either a rehearing of the case or take the appeal.

Should the caveat just filed by Mr. Smith be sufficient to arrest the patent and permit a rehearing on the whole 160 acres, I am satisfied to rest my claims to the same hearing, and if need be, can prove not only fraud on the part of Shields, but unlawful combination by the then register at the office in this place, with said Shields, to secure his entry.

Very respectfully, your obedient servant,

GILBERT C. MORRELL.

Endorsed: F. 92,217. Omaha, N. T., Jan. 16th, '61. Gilbert C. Morrell takes an appeal, or ask a reinvestigation in the case of Robert Shields. Received at the Gen. Land Office Jan. 24, 1862. Ans. 27th Jan., 1862. Pr. D. 1, 31

451 WASHINGTON CITY, D. C., *April* 9, 1862.

Hon. Caleb B. Smith, Secretary of the Interior:

SIR: I have the honor to enclose herewith my argument, as attorney for G. C. Morrell, in the matter of the claim of Robert Shields to a pre-emption the W. ½ SW. ¼ 10, and N. ½ NW. ¼ 15, 15 N. 13 E., 6th p. m., Omaha city, Nebraska.

I also enclose affidavit of W. R. Demorest, esq., to the effect that Shields, the day before his entry of said land, had promised in case he succeeded in pre-empting it, to convey the affiant certain portions of it, in consideration that he would not object to his entry; which promise he offered to redeem after he made his entry; also an affidavit of Mr. Morrell respecting Shields' offer to him to redeem a similar promise made to the register in his behalf; and that before and at the time of the entry, the affiant protested to the register against its being allowed as he claimed certain lots in the tract; also a certified copy of Shields' declaratory statement for the SE. ¼ of 10, 13 N, 10 E.

This evidence tending to show the speculative character of Shields' entry is merely cumulative, and as such I submit it with my argument, in the confident belief that inasmuch as you have pronounced the case to be one "proper for compromise," you will not
452 hesitate to reconsider your decision, and in so doing give the facts and arguments now presented as much consideration as they would have been entitled to if they had been submitted before that decision was rendered.

Very respectfully, your obedient servant,

R. T. MARSELL,
Att'y for G. C. Morrell.

Endorsed: F. 97,975. R. T. Marsell, Washington, April 9th, 1862. as attorney for G. C. Morrell, files his argument and other pa-

pers against the pre-emption of Robert Shields. Omaha dist., Nebraska. Department of the Interior, April 16, 1862, res'ly ref'd for the consideration of the Com. of the Gen. Land Office; Watt Smith, chief clerk. Rec. at L. O. April 18, '62. Pre. D. 1, 195.

In the matter of the pre-emption claim of Robert Shields to the west half of the southwest quarter of section ten and the north half of the northwest quarter of section fifteen, in township fifteen north of range thirteen east, in the district of lands subject to sale at Omaha, Nebraska.

W. R. Demarest's affidavit.

William R. Demarest, being duly sworn, deposes and says, that he has resided in the city of Omaha, Nebraska, since the year 1856, and is acquainted with Robert Shields and the tract of land
453 above described claimed by him.

This affidant says that in the month of November, 1857, previous to the day on which said Shields pre-empted said tract of land, he, the said Robert Shields, did promise and agree to and with this affiant, that in case he succeeded in pre-empting the said land, and acquiring title thereto, he would convey to this affiant certain portions of the same in consideration that this affiant would not contest his said entry or make any objection to it; that subsequently and after said Shields had entered said land, he came to this affiant and offered to make him a deed to certain parts of the same, as he had promised, which deed this affiant refused to receive.

Affiant further says that he was present at a conversation between John A. Parker, register of the United States land office at Omaha, N. T., and Gilbert C. Morrell, at the said register's office in Omaha, in the month of December, 1867, at which conversation he heard said Parker tell said Morrell that said Robert Shields had pledged himself to him, the said Parker, that in case he was permitted to enter the said land he would deed certain portions of the same to said Morrell, in consideration of being permitted to enter the said land.

WM. R. DEMAREST.

454 Subscribed and sworn to before me this twentieth day of March, A. D. 1861.

[SEAL.] BYRON REED,
Notary Public in and for Douglas County, Nebraska Ter.

WASHINGTON, D. C., *April* 17, 1862.

Hon. J. M. Edmunds, Com. Gen. Land Office:

DEAR SIR: On the 9th int. I filed with the Secretary of the Interior my argument in pre-emption case of Robert Shields, Omaha city, Neb., entry No.

I have the honor to request that the papers in the case be sent to the department.

R. T. MARSELL,
Att'y for G. C. Monell.

Endorsed: F. 97,873 R. T. Marsell, Washington, April 17, '62.

has filed an argument with the Hon. Sec. of Interior, his argument in the case of Robert Shields, and wishes papers sent up on appeal. R. D. 1, 194, April 17, '62.

455 On 21st Nov., 1857, Robert Shields entered at the land office at Omaha city, Nebraska, under the pre-emption act of 4th Sept., 1841, the W ½ of SW ¼ of sec. 10, and the W ½ of NW ¼ of sec. 15, T. 15 N., R. 13 east 6th p. m., per certificate of purchase No. 996. He commenced his settlement on or about the 15th of April, 1856, (prior to the incorporation of Omaha city,) by laying the foundation of a dwelling house. He completed his house and moved into it on or about the 1st of Sept., 1857. He filed his declaratory statement on the 15th of Sept., 1857.

Soon after the date of Shields' entry, the city authorities of Omaha filed in the General Land Office a memorial objecting to the entry, on the ground that the land was within the corporate limits of Omaha.

On the 6th of March, 1858, the register and receiver were instructed to reinvestigate the case; accordingly a hearing was had before the receiver, the register declining to act, with the consent of the parties, having prior to his appointment been employed as attorney in the case.

Upon the investigation the following facts were disclosed by the testimony, viz: That said tract was surveyed into lots, blocks, streets and alleys, in 1856; that it was universally regarded and treated as "town property," and had been held, transferred, and occu-
456 pied as such; that Shields came into possession of several lots in this tract in 1855; that in the spring of 1856 he built a dwelling house thereon, but did not occupy it himself or with his family that year; that in June, 1856, he sold and conveyed the house and several lots to John Beeson; that Beeson occupied the premises so conveyed until the fall of 1857; that on the 16th of July, 1857, Shields filed his declaratory statement for SE ¼ 10, 13 N, 10 E, alleging a settlement on 10th April, 1857; that he afterwards (date not given) withdrew this filing; that on the 15th Sept., 1857, he filed his declaratory statement for the tract in contest, alleging a settlement in April, 1856; that about 1st Sept., 1857, he moved with his family upon the disputed tract; that on the 22d Sept., 1857, the tract he first filed for was entered by Thomas Hawes, and on that very day was deeded by him to Shields; that on 21st Nov., 1857, he entered the tract in dispute, and in November, December, and January next following, conveyed his entire interest to third parties and returned to the tract whe he had first filed, and at the date of the reinvestigation was living upon it with his family.

The receiver, in his report, says: "The testimony clearly indicates that he (Shields) has ever regarded this tract (W ½ SW ¼ 10
457 & N ½ NW ¼ 15, 15, 13) as town or city property, and that he never contemplated making such settlement and use of it as are contemplated by the pre-emption law of 1841, and that the evidence shows that an understanding was entered into by Shields, prior to his entry, by which he (Shields) was to convey lots to certain

parties having claims thereto after such entry should be made, and by such agreement induced such claimants not only to withhold opposition to it, but to aid him in obtaining it," and concludes. "The foregoing conclusions are the result of a careful examination of the testimony," "and incline me to the opinion that the entry of Shields was not made in conformity to the pre-emption act of 1841," and "ought to be cancelled."

On this report the Commissioner of the General Land Office cancelled Shields' entry on 12th Jan'y, 1859, and his decision was affirmed by the Secretary of the Interior (Thompson) upon appeal, May 5, 1860, and the land was ordered by the Commissioner, per letter of May 15th, 1860, to be brought into market, after thirty days' notice, under the provisions of the act of Congress approved Aug. 3d, 1846, and was accordingly offered at public sale, and purchased by E. V. Smith and G. C. Morrell on 10th July, 1860, per certificates 1,403 and 1,404. On 20th March, 1861, the issue of patents to Smith and Morrell was arrested by a caveat
458 filed in the office of the Secretary of the Interior, (Smith,) whose order to "suspend issue" is endorsed thereon; and on the 13th Dec., 1861, the Secretary reviewed and reversed the decision of his predecessor, (Thompson,) and directed that a patent be issued to Shields. At this stage of the case, and before the patent had issued, J. C. Morrell, who had purchased the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of 10, 15, 13, at the public sale on 10th July, 1860, protested against the decision of Secretary Smith being carried into effect, on the ground that he had no notice of any objection to his entry, and claiming a rehearing, or the privelege of appealing.

Such is a brief statement of the case. In its consideration three principal questions naturally arise:

(1.) Has the head of a department the power to review and reverse the decision of his predecessor?

(2.) Are the register and receiver, by the act of 1841, constituted sole judges of the facts which entitle a settler to pre-emption, and is their decision not subject to the review of any other officer?

(3.) Has Robert Shields established a right to pre-emption to the land in dispute?

(1.) Has the head of a department the power to review and reverse the decision of his predecessor?

The power to reverse is a necessary incident to the power
459 to review; and hence I shall confine myself to a discussion of the latter branch of the question, viz., the power to review, and its application to the case in hand.

The proposition laid down in behalf of Shields, that a Secretary may review his own decisions, is not universally true. Indeed, I can see no difference in principle between reviewing his own decisions and reviewing that of his predecessor; for, in legal contemplation, the person who, for the time being, is incumbent of the office, is not regarded, but the officer only. And I conceive that, for the purpose of the argument, any act of a public officer, as such, has no reference whatever to the individual who occupies the office. The question,

then, resolves itself into this: Can a department review its own decision? I answer, unquestionably it can under some circumstances. Attorney General Cushing, in his opinion of May 29th, 1856, (Ops., vol. 7, 701,) holds this language: "When a thing is decided and done by the head of a department, acting within the scope of his lawful authority, it can be revised by his successor only on the ground of mistake in a matter of fact, or the discovery and production of material new testimony." Mr. Crittenden, in his opinion of Dec. 28, 1852, (Ib., vol. 5, p. 668,) addressing the Secretary of the Treasury, says: "To set aside an act done by authority
460 competent in law is the exercise of a superior authority. Yours being equal only, you cannot do it." And Mr. Cushing, in the opinion already cited, says further: "Where an opinion of a head of a department has not been carried into effect," and is "an unexecuted opinion merely, it is open to revision;" otherwise not. Mr. Crittenden, in his opinion of June 30, 1851, (Ib., vol. 5, p. 391,) uses these words: "The decision of a Secretary of the Treasury, as indicated by his official acts, or, in other words, when they have become things done, may have a legal, and in some instances a binding effect." To the same purport is the decision of the Supreme Court in the case of the United States *vs.* The Bank of the Metropolis. (15 Peters, p. 400.) "This right in an incumbent of reviewing his predecessor's decision extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of the department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to,
to construe the law under which the allowance was made, and
461 to settle the rights between the United States and the party to whom the credit was given."

In the above opinions of the principal law officers of the government, the principle of which has been affirmed by the supreme judicial tribunal of the country, we have an infallible test by which to determine in what instances the decision of a department may be reviewed. Let us apply that test to the case in point. Has the decision of Secretary Thompson been executed or not? Is it an act done? It is contended, on the side of the affirmative, "that the patents have not been delivered;" therefore the decision is an "unexecuted opinion merely." It is true the simple ministerial act, which consists in the emanation of the patents, has not been done. But does that alone constitute the execution of the decision—the act done—which is required? I think not. It does, indeed, constitute the final act, or the consummation of the transaction; but it is not in itself the complete act. Mr. Thompson's decision was executed to this extent; that the land was offered at public sale, after thirty days' notice; was purchased in good faith by Smith and Morrell, to whom the register issued certificates of purchase, and who afterwards sold it to third parties, who have valuable improvements upon it. Now, here was as much "an act done," "a decision executed," so

far as to conclude the executive, ex. cequs et bono, as if a
462 patent had actually issued; for rights have become vested under the decision, which it would work great injury and injustice to disturb. It may be asked, would not this be the case upon the occasion of any entry? I answer, by no means; for in ordinary cases the purchaser calculates the contingency of his entry being irregular or unlawful, and prepares to decide the event. But where a solemn decision has been rendered by a public executive officer, acting in a judicial or quase-judicial capacity, parties consider the questions decided, the rights adjudicated, as being definitely settled, and all controversy as at an end, so far as regards that particular case and that particular judicature. If it were otherwise, there would be nothing settled; but each successive administration, upon its advent into power, because forsooth of a change of governmental policy, would immediately be beset and annoyed by claimants with petitions for the reversal of the decisions of their predecessors, upon the most frivolous pretexts. In this very case the Secretary has only been out of office sixteen days when the caveat was filed by the counsel for Shields with his successor.

But can a review in this case be justified upon any other
463 principle laid down by the authorities above cited? Has there been "a mistake in matter of fact? None is alleged. On the contrary, both predecessor and successor seem to have rightly apprehended the facts.

The only difference between them is as to the conclusions to be drawn from those facts. Has "material new testimony been discovered and produced?" Not one iota; but the decision has been reversed upon the evidence already on file, elicited upon the examination by the receiver. Nor does this line of argument tend in the least to deny the right to reject a decision as a precedent. "A decision of a predecessor," says Mr. Cushing, (Op. vol. 7, p. 701,) "may be rejected as a precedent, though it cannot be reversed or annulled as an act. It is one thing to undo an act done, and quite another to cease to persevere in a previous line of action as to acts of a continuous nature." I may with great propriety conclude this branch of the inquiry by citing the language of Attorney General Legare, in his opinion of April 29, 1842, (Ib., vol. 4, p. 23.) "I have never failed to reccommend what sound policy, if nothing more, imperatively requires, that decision once solemnly made by any of the executive departments be adhered to until some new law, or some judicial decree, alter or overrule them." Mr. Cushing's opinion of
Aug. 30, 1864, (Ops. vol. 6, p. 697,) is to the same effect, and
464 both are in perfect harmony with the above decision of the Supreme Court.

(2.) Are the register and receiver, by the 12 section of the act of 1841 constituted sole judges of the facts which entitle a settler to pre-emption, and is their decision not subject to the review of any other officer? The 12th section of the act of 4th Sept., 1841, declares: "That prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and

improvement thereby required shall be made to the register and receiver," "agreeably to such rules as shall be prescribed by the Secretary of the Treasury." The manifest intent of this provision is to confer on the register and receiver the exclusive power to decide in the first instance upon the sufficiency of the evidence to establish a pre-emption right, agreeably to the rules prescribed by the Secretary, but not to preclude the right of appeal to the Commissioner of the General Land Office. This clause was incorporated into the law of 1841 from that of 1830, and it may be well to advert to the construction of the law of 1830, as given in the nine rules of President Jackson, promulgated May 6th, 1836, in its bearing upon this very point. The whole tenor of these rules recognizes the power of revision in the Commissioner in all cases, without distinction. In the
465 4th of those rules it is declared: Where "there is good reason to believe, from the evidence reported or any other information, that the decision of the register and receiver was obtained by fraud or founded in material error of fact or of law, the patent shall be suspended as hereinafter provided;" in the 5th it is declared "if the supposed error be prejudicial to the United States the patent shall be withheld until the direction of Congress, or the decision of some competent judicial tribunal shall be obtained, or the claimant shall produce to the Commissioner satisfactory evidence to remove the objection." In the 7th rule it is declared, "where there is but one claimant and the decision is against him, and there is good reason to believe that such decision was erroneous and unjust, the case shall be returned to the land officers for their re-examination," &c. It is true, that provision is made here only for cases where "the supposed error is prejudicial to the United States," or "where there is but one claimant, and the decision is against him," but the material point with us is to ascertain whether the right of review exists at all. If it exists at all, it exists for one purpose as well as another. Now it is to be presumed that the framers of the law of 1841, when they incorporated into it the provision in question from that of 1830,
466 were perfectly familiar with the exposition of the latter that had been given by the Secretary of the Treasury, with the advice of the Attorney General and the approval of the President, and understood its import; and hence it is reasonable to suppose that if they had intended to make the register and receiver the sole judges of the facts which entitle a settler to pre-emption without appeal they would have said so in totidem verbis. This view of the case is confirmed by the fact that by the 12th section of the act of 1841 proof of the settlement and improvement required is to be made to the satisfaction of the register and receiver in all cases, whether there be one or more settlers; the only difference between the two cases being that where there are more settlers than one, the right of appeal is expressly given by the 11th section. How does the expression of the fact in the 11th section in the one case exclude the right in the other? Not necessarily, else why the very general language of the 12th section, comprehending all pre-emption claims whatsoever allowed under the provisions of that act? Undoubtedly the register

and receiver are, by necessary implication, clothed with the power of determining what proof shall be required of "settlement
467 and improvement;" in the first instance, by the 11th section, where there are more settlers than one. Then why confer the power anew in the succeeding section, if it were designed to make a distinction between the two classes of pre-emptions? Again, in Shields' case the facts were necessarily treated by the register and receiver in the preliminary examination as being comprehended under the provisions of the 12th section, because the conflicting claim had not as yet been preferred. There was no contest; and where there is no contest there is nothing to appeal, unless the decision be against the claimant.

But even admitting that the power of revision is not conferred on the Commissioner in such cases by the act of 1841, it certainly is by the act of 4th July, 1836, (Statutes, vol. 5, p. 107,) which declares "that the executive duties," prescribed by law, appertaining to the surveying and sale of the public lands, "shall be subject to the supervision and control of the Commissioner, under the direction of the President of the United States," and the Supreme Court say in the case of Wilcox *vs.* Jackson, (XIII Peters, p. 513,) that "the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective
468 duties;" and Attorney General Wirt says (Ops. vol. 2, p. 5,) that "the President of the United States, whose peculiar constitutional function it is to see that the laws are properly executed, is not himself to become instrumental in a conscious breach of those laws because an inferior officer has ignorantly taken a false step."

It is conceded that the Commissioner is authorized "to correct errors where they are clear and palpable." Admitting this proposition to be correct, who is to determine what errors are "clear and palpable?" Why, evidently, the Commissioner; errors may be clear and palpable to the apprehension of one man or one tribunal, which are not so to that of another. The Commissioner did no more in this case than correct errors. When an error was found to exist, he referred the case to the register and receiver for re-examination, and upon the report of the latter set aside the entry. The case upon re-examination was to all intents and purposes heard and determined by the local officer, who drew his conclusions from the facts detailed before him in evidence, as "the result of a careful examination of the testimony," and expressed the opinion that the entry "ought
469 to be cancelled." The idea that the finding of the facts by the register and receiver, in an uncontested case, should receive as much consideration as the finding of facts by a jury, is a mere assumption not founded in reason; for the finding of the facts by the register and receiver is wholly upon ex-parte evidence, while that of a petit jury is upon a full hearing of both sides of the case; and this proposition being shown to be erroneous, the dependent one, that "to justify a judge in setting aside a verdict on the ground that it is against evidence, he must be satisfied that it is clearly and palpably against the weight of evidence," however true in the ab-

stracts, has no application to the case in hand, for here the evidence is necessarily all on one side, and hence there can be no preponderance of it.

The Supreme Court held, in the case of Elliot *et al. vs.* Pierrot *et al.*, (1 Peters, p. 340,) that "where a court has jurisdiction," "its judgment, until reversed," is binding on every other court. But if it act without authority its judgments and orders are "nultities;" and in the case of Wilcox *vs.* Jackson, already cited, they say, "the judgment of any court acting beyond the pale of its authority" is "reversib'e," and if they (the register and receiver) undertake to grant pre-emptions on land on which the law declares they shall not be granted, then they are acting upon a subject-matter not
470 within their jurisdiction;" and in the case of Barnard's heirs *vs.* Ashley's heirs, (18 Howard, p. 44,) they say, on the returns made by the register and receiver of an investigation ordered, "the Commissioner does in fact exercise supervision over the acts of the register and receiver." This power is exercised by virtue of the act of July 4th, 1836, sec. 1. The necessity of supervision and control vested in the Commissioner, acting under the direction of the President, is too manifest to require ornament, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish by ex-parte affidavits cultivation and possession of particular quarter sections of land, when the fact is untrue; that the act of 1836 modifies the power of registers and receivers to the extent of the Commissioner's action in the instance before us, we hold to be true. But if the construction of the act of 1836 to this effect were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety."

(3.) Has Robert Shields established a right of pre-emption to the land in dispute?

The pre-emption act of 1841 expressly exempts from pre-emption, under its provisions, "lands inclosed within the limits of any incorporated town. Secretary Thompson, in his letter of May 5th,
471 1860, says, "this land was included within the incorporated limits of the city of Omaha, under the act of incorporation of Feb. 2, 1867, and hence was not subject to pre-emption except to such bona-fide claimants as had settled thereon prior to the date of incorporation, and who could show a full compliance with all the requirements of the act under which they claimed such right." The Commissioner, it is true, in his report of Feb. 1, 1860, admits that the land was subject to pre-emption at the time of Shields' alleged settlement, (in April, 1856;) but then Shields forfeited his right by his failure to file his declaratory statement in time. The Secretary, indeed, decided Nov. 6th, 1858, (Lester, p. 404,) "that the forfeiture created by the 12th section of the act approved July 22d, 1854, for failure to file a notice of the specific tract claimed within three months after the survey has been made in the field, was not intended to apply to or be enforced in other cases than those in which the land is claimed adversely, before the first settler actually files a notice of his intention to pre-empt the land upon which he has settled."

This land, however, was included within the incorporated limits of Omaha city as early as Feb. 2, 1857, and Shields did not file until Sept. 1857; so that he does not come within the principle of
472 this decision, and cannot avail himself of this relaxation of the strict letter of the law, it is said. "The fact that Shields erred in believing that the land was town property, is no reason for rejecting the pre-emption, when, having discovered his mistake, he availed himself of the only means to prevent the loss of his capital." But we hold that Shields did not err in that belief; if he had, we admit that his belief of that fact would have afforded no reason per se for rejecting his claim, but it certainly would as evidence of a speculative intention, of a want of that bona fide which is an essential ingredient of a valid pre-emption.

It is said further, "that to establish the principle without qualification, that the right of pre-emption cannot exist upon lands within the limits of incorporate towns, would be to place it in the power of territorial legislatures to incorporate all the lands in the Territory, and exclude them all from settlement." I do not understand that Secretary Thompson lays down any such broad principle. He says, on the contrary, that such lands are subject to pre-emption to "such bona-fide claimants as had settled thereon prior to the date of incorporation." It certainly would be suicidal policy for a territorial legislature to incorporate all the lands in the Territory, and thus
473 exclude them all from agricultural pre-emption; and the probability of the exercise of the power would exceedingly remote. But if the attempt should ever be made, the President of the United States is invested with the authority to afford a summary remedy. He has only to order a public sale of the land, and then each incorporated town will immediately be restricted to the 320 acres maximum allowed by the act of 23d May, 1844; the evil would work its own remedy.

I cannot agree, as is claimed, that there is no evidence of fraud in filing a claim for one tract, and afterwards withdrawing it, alleging mistake, and filing for another, when we consider the fact that these tracts are several miles apart, the one being 12 miles north and 18 miles east of the other, and the additional fact of the discrepancy in the alleged dates of settlement, the one being in April, 1856, and the other twelve months thereafter. It is not likely that Shields could be mistaken in all these particulars. It is said: "The right of Shields was admitted by the register and receiver upon the examination of the proofs. He complied with the law. They received the money and gave the certificate, and no person contested his right." I answer: the right was admitted (upon ex-parte evidence,) because
474 no one appeared to contest it, probably because there was no notice given of the time when Shields would appear to assert it.

The Commissioner, in his report of Feb. 1, 1860, says: "When a party settles upon a tract of land, and files his declaratory statement for it, he can correct or amend the filing, if he has erred in the description of this claim, but no authority has been given for a man to withdraw his filing at his option, and then settle upon and file for an-

other tract. The 4th section of the act of 1843, and the circular of Dec. 3d, 1856, forbid such a transaction. If a settler files on a tract and abandons or settles the same, he is concluded; he has exhausted his right; and if he files upon and enters another tract, claiming under the pre-emption law of 1841, he does so in violation of that law. Such has been the uniform ruling of this office." Is a principle thus firmly established and acted upon for 20 years to be abandoned now for the first time, and that, too, not merely in the way of fixing "a precedent," but of undoing "an act done?" The 4th section of the act of March 3d, 1843, reads thus: "That where an individual has filed under the late pre-emption law his declaration of intention to
475 claim the benefits of said law, for one tract of land, it shall not be lawful for the same individual, at any future time, to file a second declaration for another tract." It is held that "this would apply only to a claim filed before the passage of the law. The words are in the past tense; but if prospective, a fair construction would not defeat a claim upon the first tract, because a claim had been previously filed for another." This provision, though in the past tense, could not have been intended to apply only to claims filed before the passage of the law. It was no so regarded, certainly, in the General Land Office, for the Commissioner, as late as Dec. 3d, 1856, in his circular of that date, speaks of it in the present tense, as being in then subsisting force. He used these words: "When a claimant files a declaration which may prove to be invalid from any cause which would have prevented him from consummating a pre-emption under it, such illegal filing will be treated as a nullity, it being the purpose of the law to allow a claimant a pre-emption upon one tract and nothing more." Can it be supposed for a moment that Congress would be guilty of such an absurdity as to pass a law so partial in its operation as this would be if the construction contended for were allowed? Such a construction would have the effect to legalize all filings
476 made before the date of the law, even though two or more were made by the same person, and would also legalize all filings made after the date of the law, where none were made by the same parties before its date, and the claimant would have his election to enter by virtue of either. It would only invalidate those filings made after the law by inividuals who had filed before the date of it. Under such a construction the remedy would not reach the mischief. The law was designed to have a prospective as well as a retrospective operation. This view is confirmed by the contemporaneous exposition of the law given in the General Land Office circular of May 8, 1843.

Another badge of fraud in the transaction is that Shields, two days after his entry, executed a deed of an undivided half of the land, a similar deed to another party on 26th Jan., 1858, and on 2d Dec., 1857, a few days after his entry, a similar deed still to certain lots in a portion of the tract. The Commissioner, in his letter to the Secretary of the Interior of July 2, 1857, says: "A previous contract to sell a portion of a pre-emption claim vitiates the entry, and the
477 same cannot be confirmed under confirmatory laws." It ap-

pears from the report of the receiver that these deeds were executed in pursuance of agreements made before the date of Shields' entry, by which he induced certain parties having claims to the land "not only to withhold opposition to it, but to aid him in obtaining it."

The objection urged by the counsel of Shields that the Commissioner had not the power, upon the mere report of the receiver, to cancel the entry of Shields, comes with an ill grace from him at this stage of the case, when we consider that he assented to the arrangement by which the receiver was to preside alone. But even allowing that the objection is well taken, it affords no additional argument in favor of the sufficiency of his claim. It is tantamount to an objection to the whole proceeding as a nullity, and, if anything, presents a reason why the matter should be returned to the local office for re-investigation.

I have labored under considerable embarrassment in the discussion of this question, because you have already decided it; yet, as my client, Dr. Morrell, was deprived of the privilege of filing an argument before its determination, I beg that the foregoing may receive a careful perusal, and as the decision has not been "executed,"
478 that it may be reviewed; or, in view of the magnitude of the interests involved, and the importance of the questions, that the case be remanded to the register and receiver for the production of "material new testimony," if any, or submitted for the advice of the Attorney General of the United States.

With much respect, your obedient servant,

R. T. MARSELL,
Att'y for G. C. Morrell.

To Hon. C. B. Smith, Sec. of the Interior.

April 9, 1862.

Endorsed: Argument of R. T. Marsell, attorney for G. C. Morrell.

In the matter of the pre-emption claim of Robert Shields to the west half of the southwest quarter of section ten, and the north half of the northwest quarter of section fifteen, in township fifteen north of range thirteen east of the sixth principal meridian, in the district of lands subject to sale at Omaha, Nebraska, Gilbert C. Morrell, being duly sworn, deposes and says: That he has resided in the city of Omaha, Nebraska, since the month of April, 1857, and is acquainted
479 with the said Robert Shields and the above-described tract of land claimed by him. Affiant says that at the time said Shields made proof and payment for said tract of land, to wit, in November, 1857, and also previous to that time, this affiant protested to the then register of the land office at Omaha, one John A. Parker, that the entry of said land by said Shields should not be permitted, and informed the said Parker that he (this affiant) claimed to own certain lots of land situate in said tract; afterwards this affiant had another conversation with said Parker in the register's office in Omaha, in the latter part of December, 1857, at which time and place the said John a Parker, then the register of the land office, Omaha, distinctly

and unequivocally stated to this affiant that he, said Robert Shields, had pledged himself to gives deeds to this affiant for all the lots he claimed in said tract; that he, said Parker, had required such a pledge from said Shields before he proved up, as one of the conditions on which he would be permitted to prove up, and that said Shields freely gave such pledge in consideration that he, said Parker, as register of the United States land office at Omaha, would permit him to enter the said tract of land.

480 This affiant further says, that after said Shields had entered said tract of land, he came to this affiant and offered to redeem the promise he made to said John A. Parker before he proved up, to the effect that he would deed to this affiant certain lots of land from the tract he had pre-empted, and offered to execute and deliver a deed to said lots, which this affiant refused to receive.

This affiant further says, that at the conversation above mentioned, held with John A. Parker, register, in December, 1857, this affiant told said Parker that said Robert Shields had conveyed by deed to one Dodge or Test, of Council Bluffs, Iowa, the undivided half of said tract of land, and was therefore incompetent to redeem the pledge he had given. Said Parker replied by saying that he knew such a deed had been made, but that some other arrangement had been made, or would be made, so that the original promise or pledge made by Shields to deed the lots as aforesaid should be carried out to the letter.

GILBERT C. MORRELL.

Sworn and subscribed to before me this twentieth day of March, A. D. 1862.

[SEAL.] BYRON REED,

Notary Public in and for Douglas County, Nebraska Ter.

Endorsed: G. C. Morrell; affidavit.

481 WASHINGTON, 23*d Sept.* 1861.

Hon. Caleb B. Smith, Sec'y of the Interior:

SIR: Robert Shields, of Nebraska Territory, claimed a pre-emption on the west half of the southwest quarter of sec. 10, and on N. half of the NW. quarter of sec. 15, in township 15 N. of R. 13, in said Territory. His claim and proof were duly submitted to and considered by the register and receiver of that land district, as required by law, and his claim was allowed by them, and he paid for the land and received the usual certificate of purchase. Afterwards, though there was no other settler on the said land who claimed or could claim a pre-emption to the same, an unlawful combination of land speculators, who had no claim to the land, made complaint to the Commissioner of the General Land Office against the entries of Shields and others; and the Commissioner, by letter, directed the usual re-examination to be made by the register and receiver in cases coming within the 11th section of the pre-emption act of 4th Sept'r, 1841; that is in cases where "two or more persons shall have settled on the same quarter section of land." Though this authority for a re-examination did not embrance the case of Shields, as there was by no

482 other settler on the land claimed and purchased by him, yet it was assumed to embrace his case; and when the re-examination was had the register refused to act and did not act; but the receiver, who had no authority or jurisdiction except in connection with the register, either under the Commissioner's letter or under the pre-emption laws, undertook to act and did act alone, and in a most partial, prejudiced and unjust manner; and assuming to excercise the powers jointly conferred by law upon the register and receiver, he made a report adverse to the claim of the said Shields. This unauthorized and void report of the receiver alone, made without color of authority, and in open violation of the whole system of the pre-emption laws, was received and confirmed by the Commissioner of the General Land Office; and the entry of the said Shields, made upon a lawful decision of both the register and receiver, was directed to be set aside and cancelled. Having no other remedy against this unauthorized and void proceeding, Shields appealed to the late Secretary of the Interior, but he, for want of proper examination or consideration, or for some other cause, confirmed the void act of the Commissioner's confirming the unauthorized and void act of the said receiver; and the land being public land of the United States, to which no
483 other person had any claim, was directed to be offered and was offered at public sale to the highest bidder and purchased by . Against all which unauthorized acts and proceeding, and especially against the issuing of patents under the said unlawful sale, the said Shields has filed his written protest, and on which protest the present Secretary of the Interior has directed a suspension of patents until his further direction.

1. It is respectfully contended, that all action which has taken place on the unauthorized re-examination of the receiver alone, is in open violation of law and necessarily void, and cannot effect the sale and certificate to Shields by the lawful action of the register and receiver, acting under the authority vested in them jointly by the pre-emption laws, and that any number of confirmations of unauthorized and void act or decision cannot make a valid one.

2. That all the evidence taken by the receiver alone on such re-examination is void and could not lawfully be considered in acting in the said case.

3. That the case of Shields was not one subject to re-examination under the 11th section of the pre-emption act of 1841, but that if it had been it could only lawfully be so re-examined by the register and receiver, as was directed by the Commissioner, and not by the
484 receiver alone, in whom law vests no authority except when acting jointly with the register. Other points of objection to the action of the receiver will be found set forth in the grounds of appeal, and fully sustained by argument and authority, of many of which, and especially of the fatal one herein set forth, no notice was taken by the late Secretary of the Interior. Arguments and authorities to sustain the right of Shields against every possible objection that has been or can be urged against it will be found among the papers in this case.

and unequivocally stated to this affiant that he, said Robert Shields, had pledged himself to gives deeds to this affiant for all the lots he claimed in said tract; that he, said Parker, had required such a pledge from said Shields before he proved up, as one of the conditions on which he would be permitted to prove up, and that said Shields freely gave such pledge in consideration that he, said Parker, as register of the United States land office at Omaha, would permit him to enter the said tract of land.

480 This affiant further says, that after said Shields had entered said tract of land, he came to this affiant and offered to redeem the promise he made to said John A. Parker before he proved up, to the effect that he would deed to this affiant certain lots of land from the tract he had pre-empted, and offered to execute and deliver a deed to said lots, which this affiant refused to receive.

This affiant further says, that at the conversation above mentioned, held with John A. Parker, register, in December, 1857, this affiant told said Parker that said Robert Shields had conveyed by deed to one Dodge or Test, of Council Bluffs, Iowa, the undivided half of said tract of land, and was therefore incompetent to redeem the pledge he had given. Said Parker replied by saying that he knew such a deed had been made, but that some other arrangement had been made, or would be made, so that the original promise or pledge made by Shields to deed the lots as aforesaid should be carried out to the letter.

GILBERT C. MORRELL.

Sworn and subscribed to before me this twentieth day of March, A. D. 1862.

[SEAL.] BYRON REED,
Notary Public in and for Douglas County, Nebraska Ter.

Endorsed: G. C. Morrell; affidavit.

481 WASHINGTON, *23d Sept.* 1861.

Hon. Caleb B. Smith, Sec'y of the Interior:

SIR: Robert Shields, of Nebraska Territory, claimed a pre-emption on the west half of the southwest quarter of sec. 10, and on N. half of the NW. quarter of sec. 15, in township 15 N. of R. 13, in said Territory. His claim and proof were duly submitted to and considered by the register and receiver of that land district, as required by law, and his claim was allowed by them, and he paid for the land and received the usual certificate of purchase. Afterwards, though there was no other settler on the said land who claimed or could claim a pre-emption to the same, an unlawful combination of land speculators, who had no claim to the land, made complaint to the Commissioner of the General Land Office against the entries of Shields and others; and the Commissioner, by letter, directed the usual re-examination to be made by the register and receiver in cases coming within the 11th section of the pre-emption act of 4th Sept'r, 1841; that is in cases where "two or more persons shall have settled on the same quarter section of land." Though this authority for a re-examination did not embrance the case of Shields, as there was by no

other settler on the land claimed and purchased by him, yet it was assumed to embrace his case; and when the re-examination was had the register refused to act and did not act; but the receiver, who had no authority or jurisdiction except in connection with the register, either under the Commissioner's letter or under the pre-emption laws, undertook to act and did act alone, and in a most partial, prejudiced and unjust manner; and assuming to excercise the powers jointly conferred by law upon the register and receiver, he made a report adverse to the claim of the said Shields. This unauthorized and void report of the receiver alone, made without color of authority, and in open violation of the whole system of the pre-emption laws, was received and confirmed by the Commissioner of the General Land Office; and the entry of the said Shields, made upon a lawful decision of both the register and receiver, was directed to be set aside and cancelled. Having no other remedy against this unauthorized and void proceeding, Shields appealed to the late Secretary of the Interior, but he, for want of proper examination or consideration, or for some other cause, confirmed the void act of the Commissioner's confirming the unauthorized and void act of the said receiver; and the land being public land of the United States, to which no other person had any claim, was directed to be offered and was offered at public sale to the highest bidder and purchased by . Against all which unauthorized acts and proceeding, and especially against the issuing of patents under the said unlawful sale, the said Shields has filed his written protest, and on which protest the present Secretary of the Interior has directed a suspension of patents until his further direction.

1. It is respectfully contended, that all action which has taken place on the unauthorized re-examination of the receiver alone, is in open violation of law and necessarily void, and cannot effect the sale and certificate to Shields by the lawful action of the register and receiver, acting under the authority vested in them jointly by the pre-emption laws, and that any number of confirmations of unauthorized and void act or decision cannot make a valid one.

2. That all the evidence taken by the receiver alone on such re-examination is void and could not lawfully be considered in acting in the said case.

3. That the case of Shields was not one subject to re-examination under the 11th section of the pre-emption act of 1841, but that if it had been it could only lawfully be so re-examined by the register and receiver, as was directed by the Commissioner, and not by the receiver alone, in whom law vests no authority except when acting jointly with the register. Other points of objection to the action of the receiver will be found set forth in the grounds of appeal, and fully sustained by argument and authority, of many of which, and especially of the fatal one herein set forth, no notice was taken by the late Secretary of the Interior. Arguments and authorities to sustain the right of Shields against every possible objection that has been or can be urged against it will be found among the papers in this case.

The undersigned, therefore, respectfully pray that the said case may be reconsidered by the honorable Secretary, and that which appertains to justice by a due execution of the law done; and as in duty bound they will ever pray, &c.

CHAS. E. SHERMAN,
F. BIGGER,
Attorneys for Shields.

Endorsed: F. 85,104. Chas. E. Sherman and F. Bigger, att'ys, appeals from the decision of the late Secretary in the case of Robert Shields' pre-emption case. Dep't of the Interior, Oct. 1, 1861. Res'ly ref'd to the Commissioner of the Gen. Land Office for report. Moses Kelly, chief clerk. Ans. Letter to Sherman and Bigger, Oct. 15, 1861. Rec'd 30 Sept., '61. Mr. Beard. 1, 41.

485 WASHINGTON CITY, D. C. *Feb. 18th*, 1863.

Hon. J. M. Edmunds, Com. of Gen. Land Office, Washington, D. C.:

SIR: In the matter of the pre-emption of Robert Shields to the north ½ of the northwest ¼ of sec. 15, and the W. ½ of the SW. ¼ of sec. 10, in township 15 N. of range E. No. 13 East, in the Territory of Nebraska, I am informed by the reg. and rec. of the local office at Omaha that this entry has been sustained by the Sec'y of the Interior and ordered a patent to issue on the same, and that the same will issue to him upon filing his oath of allegiance. I will state that in the spring of 1862 the said Robert Shields left his residence in the Teritory of Nebraska on a prospecting tour to the gold fields of Colorado or Nevada, and has not returned nor has he been heard of since; that, said Shields was while in the Territory of Nebraska (and no doubt is yet) an unconditional, and indeed radical Union and administration man; that he was a native and long resident of the State of Pennsylvania prior to his settlement in Nebraska Territory is well known, and his loyalty can be abundantly tested by gentlemen of this city, as well as at his home. May we therefore beg of your honor to permit the issuing of said patent, and thereby
486 relieve the family of said Shields from further anxiety in regard to the title of said land, assuring your honor that upon the return of said Shields his oath of allegiance shall be taken and filed in this office.

We think under these circumstances your honor will not refuse to grant him this request.

I am most respectfully your obedient servant,
JOHN J. REDICK,
Of Counsel for Robert Shields.

Endorsed: G. 13,428. Robert Shields. Washington, Feb. 18, 1863. Encloses a paper relating to the pre-emption of Robert Shields in Nebraska. 1. 421. Received at Gen. Land Office, Washington, D. C., Feb. 19, 1863. Cook. Feb. 19, 1863.

DEPARTMENT OF THE INTERIOR,
Washington, Dec. 23, 1862.

JUDGE EDMUNDS: Some months ago I directed a suspension of the order of the department in the pre-emption claim of James Shields. I shall be obliged to you if you will send me any papers on file presenting any reasons for the revision of the order of the department.

Very respectfully,

CALEB SMITH.

487 Endorsed: G. 10,373. Hon. Sec'y of the Interior, Dec. 23, 1862. Asking that the Com. of Gen. Land Office furnish the papers in the case of Robert Shields, Omaha dist. N. T., for use of Int. Dep't. Ans'd 23d Dec. 1862. H. J. G. Rec'd at the Gen. Land Office, Dec. 23, 1862. Pr. D. 1, 376.

DEPARTMENT OF THE INTERIOR,
Washington, Dec. 13, 1861.

SIR: Charles E. Sherman and F. Bigger, as the att'ys of Robert Shields, filed a memorial in this department on the 1st of Oct. last, asking a re-examination of the decision of my predecessor, Sec'y Thompson, cancelling the entry made by said Shields Nov. 15, 1857, of the W ½ of SW ¼, sec. 10, and N ½ of NW ¼ of sec. 15, in T. 15, N. of range 13, in Nebraska Territory. Your letter of the 14th Oct., with the accompanying papers, presents a history of the case, from which it appears that on the 15th Sept., 1857, Shields filed in the land office at Omaha a declaratory statement alledging that he had settled upon the land in question in April, 1856. Upon this statement he was permitted by the local officers, upon proofs satisfactory to them, to enter the land on the 21st November, 1857. He then paid the purchase money and received a certificate of entry.

Shortly after the entry the ci.y authorities of Omaha filed in
488 the land office a memorial objecting to the entry, upon the ground that the land within the corporate limits of the town, and was divided into streets and lots, a part of which had already been sold by the town authorities and had been improved by the purchasers. On the 6th March, 1858, the register and receiver at Omaha were instructed by the Land Office to investigate the right of Shields to a pre-emption, and report their opinion. An investigation was made by the receiver, (the register declining to act, with the assent of the parties, for the reason that he had before been employed as counsel in the case,) who reported adversely to the claim of Shields. Upon this report the Commissioner of the General Land Office cancelled the entry of Shields on the 12th January, 1859. This decision was affirmed by Secretary Thompson on the 5th May, 1860. The land was then ordered to be sold as public lands of the United States at public sale, after thirty days' notice, and was so sold on the 10th July, 1860, to E. V. Smith and G. C. Monell. The issue of patents upon the last sale having been suspended, this application for re-examination of the claim of Shields has been made. The first question to be decided is has the department the power to review the decision

made by Secretary Thompson? It is a rule well established by prin-
ciple and practice, that the decisions and orders of the head of
489 the executive departments of the government cannot be re-
viewed or recinded by a successor after they have been ex-
ecuted and carried into effect, except upon the ground of mistake in a matter of fact, or the discovery and production of material new testimony. As was said by Attorney General Cushing, vol. 7, Opinions Att'y Gen'l, page 701: "When a thing is decided and done by the head of a department, acting within the scope of his lawful authority, it can be revised by his successor only on the ground of a mistake in a matter of fact, or on the discovery and production of material new testimony." The power of the head of a department to review or recind the decision of his predecessor was denied by Mr. Cushing only when it had been executed or carried into effect. In the same Opinion, page 695, he said, in speaking of the refusal of Secretary Ewing to confirm a grant of lands to the State of Iowa, which Secretary Walker had decided that State was entitled to, "he considered, as undoubtedly he might lawfully do, that Mr. Walker's opinion not having been carried into effect, and being an unexecuted opinion merely, was open to revision." In the case now under consideration, Secretary Thompson decided that Smith and Monnell were
entitled to the laws in controversy. Had this decision been
490 executed by the execution and delivery to them of patents
for the land, I should regard the question as finally settled, and the rights vested in them would be beyond the power of this department to disturb, without evidence of mistake, or new material testimony. The patents, however, have not been delivered, and the decision of secretary Thompson is therefore, "an unexecuted opinion merely."

I do not therefore feel at liberty to deny the application of the claimant to review the decision and to decide upon his rights according to my own convictions of the law and the facts.

The right of Secretary Thompson to review and reverse his own decision before it was carried into effect was undoubted. His successor, finding the case in that position, with an unexecuted opinion in favor of one of the claimants, has the same right to review the decision that Secretary Thompson had before he went out of office. The right of Mr. Shields to enter the land in question was admitted by the register and receiver of the proper district upon an examination of the proofs made by him in compliance with the law. They received the purchase money as agents of the United States and executed to him the usual certificate of purchase. No person, at that
time, appeared to contest his right, but representations were
491 afterwards made to the General Land Office on behalf of the
authorities of the town of Omaha that Shields had not complied with the pre-emption laws, and a cancellation of his entry was requested. The cousel of Shields insist that the Land Office had exclusive jurisdiction of the questions involving the right of Shields to a pre emption, and as there was no other settler upon the land, and no contestant, their decision was final. There is, to say the least of

it, much plausibility in this position. It was so held by Secretary Stuart in a decision made by him May 12, 1851, in which he said: "From their (register and receiver) decision as to the fact of settlement and cultivation, there is no appeal, except when two or more persons claim the right of pre-emption. The date, as well as the fact of settlement, is within the exclusive jurisdiction of the district land officers where there is but one pre-emption claimant." The Supreme Court of the United States have expressed a different opinion in a case reported in 18th Howard. But conceeding the legal power of the Commissioner of the General Land Office to review the decision of the local officers and to cancel an entry made by their permission, it is proper to consider under what circumstances, and upon what degree of proof this power should be exercised. It does not follow that the same evidence which would have authorized the land officers to reject the claim upon the original application
492 should require the Commissioner to cancel the entry. Some respect should be attached to their decision, some weight should be given to the finding of facts by them. Under any view of the case, the finding of the facts should receive as much consideration as the finding of facts by a jury. A court has legal power to set aside the verdict of a jury and award a new trial, but no sound judge will exercise this power, merely because he might have decided otherwise upon the evidence which was before the jury. To justify him in setting aside the verdict because it was against the evidence he must be satisfied that the jury clearly and palpably decided against the weight of evidence.

As stated by the court in the case of Mr. Gaitrick Watson, 4th Ohio Rep. 566, "a mere difference of opinion does not authorize a court of appeal to set aside the verdict of a jury in a court below on the ground that it is against the weight of evidence, but it must be clear that the jury have erred."

The power given by the act of July 4, 1836, to the Commissioner of the General Land Office, of "supervision and control," under which the right to cancel an entry is claimed, certainly does not confer upon him the power to try all pre-emption claims as a court of orriginal jurisdiction.

493 That power is conferred by law upon the register and receiver, and the power of "supervision and control" in the Commissioner can only authorize him to correct the errors of those officers when they are clear and palpable.

Admitting then the propriety of the unusual course of receiving a report from the receiver alone upon a reference of the case to the register and receiver, it is proper to examine that report to determine whether the facts presented by it are sufficient to show that the finding of the former register and receiver, upon which they permitted the entry, was clearly erroneous.

It is stated in the report that the land in question had been surveyed into lots, streets, &c., as a part of the town of Omaha, in 1856, and that a plat of the town embracing these lots had been lithographed and published, and that it was generally regarded as

town property. It is an admitted fact in the case that land never was legally embraced in the town plat of Omaha, and that the town proprietors never acquired any interest in it. Besides, after the entry of Shields had been cancelled, the land was sold as public land of the United States.

The evidence then in relation to this matter is wholly irrelevant, and proves nothing that has any bearing upon the . It is also stated that Shields regarded the land as town property, and bought several lots, upon one of which he built a house; that he
494 sold his house, and afterwards, before he filed his claim of pre-emption he repurchased it. The fact that Shields shared in the general erroneous belief that the land was town property, and that upon that belief he had vested his money in it, constitutes no reason for rejecting his pre-emption claim, when, having discovered his mistake, he availed himself of the only means by which he could prevent the loss of his capital invested upon the property of the government.

The property was subject to pre-emption. This is conceded by the Commissioner who cancelled the entry.

There has heretofore been some controversy upon the question whether all lands embraced within the limits of incorporated towns were excluded from settlement by pre-emptors, and the action of the Land Office has not been uniform.

Secretary Thompson, on the 5th Oct., 1859, in deciding upon a pre-emption claim of John A. Harbach to land within the corporate limits of the town of Omaha, as defined by the territorial legislature, said: "In this case, the land embraced in Harbach's claim was included by an act of the territorial legislature within the limits of an incorporated town by specific description, and it thereby became excluded from pre-emption by the very terms of the law."

In a decision made by myself the 13th April, 1861, I stated
495 "that land within the limits of an incorporated town is not subject to settlement with a view to pre-emption under the act of Sept. 4, 1841." In making this decision my attention was not called to the fact that the land involved was outside of the 320 acres the town authorities were authorized to enter. I did not intend to decide that the territorial legislature could, by extending the limits of an incorporated town beyond the extent authorized by Congress, thereby defeat the right of settlement and pre-emption granted by law.

The act of Congress of May 23d, 1844, authorized the corporate authorities of incorporated towns to occupy as a town site any portion of the surveyed public lands, and that the lands so occupied should not be subject to entry under the pre-emption laws. This right, however, was made by the same act, subject to certain limitations.

1st. The entry by the town authorities should be made before the body of the public lands in which the town site was included was offered at public sale.

2d. The entry should include only such land as was actually occu-

plied by the town, and should be made in conformity to the legal subdivisions; and

3d. That the whole amount of land so entered for a town
496 site should not exceed three hundred and twenty acres. When therefore, it is said that lands within the limits of an incorporated town are not subject to pre-emption, it must of course be understood that the limits are such as are specified in the act of Congress authorizing the entry for a town site.

The territorial legislature is unrestricted in [unrestricted in] its power to incorporate towns and define their boundaries. If it chooses to incorporate an entire county as a town it has the legal right to do so. It has, however, no legal power to determine what portion of the public lands shall be subject to pre-emption. This power belongs exclusively to Congress, and the rights conferred by Congress cannot be restricted by the territorial authorities.

Congress has conferred the right of pre-emption upon all the public lands in favor of actual settlers, with certain exceptions. One of these exceptions is the lands legally selected for a town site, not exceeding three hundred and twenty acres in extent. To that extent the town authorities, acting under an incorporation from the territorial legislature, may prevent pre-emptions of the land, because the act of Congress has conferred direct authority for that purpose. They cannot, however, deprive settlers of the right of pre-emption
497 given by Congress to any greater extent.

To establish the principle, without qualification, that the right of pre-emption cannot exist upon lands within the limits of incorporated towns, would be to place it within the power of the territorial legislatures to prohibit entirely all pre-emptions within their respective territories. The new Territories now opening to settlement may, through their legislatures, incorporate as many towns, and make them as large as they please. However unreasonable it may be to suppose they would do so, yet they have the power to embrace the entire lands of the Territories within the limits of incorporated towns, and if no lands within the limits of such towns can be subject to pre-emption, the territorial legislatures may exclude all the lands in the Territories from such settlements.

It is clear that Congress never intended to confer upon them such power, and it follows that all lands within the limits of incorporated towns, beyond three hundred and twenty acres, which the town authorities are authorized to locate, are as much subject to settlement and pre-emption as the lands outside the corporation limits.

Shields endeavored to acquire the right by settlement. The fact that he built or purchased a house on the land, believing it to be town property, so far from being an argument against his
498 claim, in my judgement, creates an additional equity in his favor. Neither law nor justice requires the government to deprive him of these improvements, and give them to another, merely because he had erroneously supposed the property was legally subdivided into town lots.

The report also objects to his claim upon the ground that "the

testimony clearly indicates that he never contemplated making such settlement and use of it as is contemplated by the pre-emption laws of 1841." The reason for this belief of the receiver, as to the indications of the testimony, is found in his statement that "every transaction of his and others, prior to his entry, having sole reference to its value as town or city property." The only inference to be drawn from this is, that as the land had been surveyed and divided into lots, and the lots had been bought and sold by Shields and others, that they all expected it to be used as town property, and not for agricultural purposes. If this would prevent Shields from acquiring a right of pre-emption, it would also prevent any other person. And yet the Commissioner in his reports that the land was subject to pre-emption.

If Shields discovered that the title he supposed he had ac-
499 quired by the purchase of town lots could not be sustained, having already built or purchased a house, he had a legal right to make such cultivation of the land as the law required, and upon that base his application for a pre-emption. If he had contemplated, at that time, that the town of Omaha might extend upon this land, and that he might find it profitable to sell it for lots, I cannot see how such an anticipation could render his entry fradulent. The law does not require that land entered for agricultural purposes by a pre-emption shall ever afterwards be used for such purposes. Having once fairly and honestly acquired a title, in compliance with the law, the pre-emptor has the same right to sell his land, or to lay off a town upon it, that any other proprietor has.

The next question urged is, that he filed a claim previously to another tract of land, which he afterwards withdrew, alleging that the claim was made by mistake.

There is in this no evidence of fraud. No proof is adduced to show that the claim was not made by mistake, as alleged by him. The 4th section of the act of 3d March, 1843, upon which the objection growing out of the fact is based, if literally construed,
500 would apply only to claims filed before the passage of that law.

The language of the law is, "Where an individual has filed, under the late pre-emption laws," &c. This is in the past tense, and does not apply to a future filing. But if it may be considered prospective, a fair construction of that provision would not defeat a pre emption claim upon one tract of land, because the claimant had before filed a claim to another tract, which had not been perfected, unless actual fraud was shown. It was correctly said by Commissioner Hendricks, in instructions to land officers, Dec'r 3d, 1856, it was "the purpose of the law to allow a claimant a pre-emption upon one tract, and nothing more, and also to prevent declarations from being presented or filed, when the intention of establishing a pre-emption is not bona fide." Shields has entered but one tract, and I see in the case no evidence of fraud in making the claim which was afterwards withdrawn.

The fact that he afterwards purchased the tract of land, proves

nothing. He had a legal right to purchase that, or any other tract, after the title of the government had been divested, without interfering with his right of pre-emption to the land in controversy,
501 unless he thereby became the owner of such an amount of land as would deprive him of the right of pre-emption.

The failure to file his claim within three months did not, in my judgement, work a forfeiture. As was decided by Secretary Thompson, (Lester, 404,) the forfeiture provided for failure to file within three months was not intended to be enforced in other cases than those in which the land is claimed adversely before the first settler files his declaration of intention to pre-empt the land.

These constitute the main points in the report of the receiver, and upon which the entry of Shields was cancelled. The case then stands thus: Shields filed his claim to pre-empt the land in the form prescribed by the law. The register and receiver received his proofs and decided that he was entitled to pre-empt it. He paid the purchase money and received a certificate of entry. Upon complaints subsequently made by some persons who had no right or interest in the land, an investigation was made by the receiver alone, and he reports adversely to the claim. His report does not present facts which, in my judgement, are sufficient to reverse the decision in favor of Shields' claim, made by the land officers, when the land was entered.

The last report presents various suppositions, which it is
502 said is clearly indicated by the testimony. Whether upon an original examination of the case these facts would be sufficient to defeat the claim, it is not necessary now to enquire. They are clearly not sufficient to reverse the decision made by the land officers have jurisdiction of the case, in the absence of all charge of fraud or [or] collusion on their part. No fraud was perpetrated upon the government by the entry of Shields. The land was subsequently sold for the same price that he paid for it, and it would require a very clear case of fraud on his part to authorize a transfer of the land, with the improvements which he has made or purchased, to other parties for the same price which he paid for the land.

The order of the Commissioner of the General Land Office, cancelling the entry of Shields, will be rescinded, and a patent will be issued to him for the land. The last purchasers will be entitled to a return of the purchase money paid by them.

Very respectfully, your obedient servant,

CALEB B. SMITH, *Secretary.*

To the Commissioner of the General Land Office.

Endorsed: F. 89, 577. Hon. Sec. Interior. Dec. 13, 1861. Returns the papers relating to the pre-emption contest between Robert Shields and the city authorities of Omaha. Pr. D., Dec. 14, '61.

503 DEPARTMENT OF THE INTERIOR,
Washington, May 5th, 1860.

SIR: The pre-emption claim of Robert Shields to W. ½ SW. ¼ sec. 10, and N. ½ NW. ¼ sec. 15, t'p. 15 N., r'g. 13 E., presented with

your report of 1st Feb. last, upon an appeal from your decision cancelling the entry of said land made by Shields, on 21st Nov., 1857, has been examined.

Shields alleges to have commenced his settlement on this land on 13th April, 1856, but did not file his declaratory statement until 15th Sept., 1857; consequently his right under his alleged settlement was lost.

It is urged, however, that he was prevented from filing within the time required by law through fear of bodily harm from a "claim club" which existed in that neighborhood, and was organized to prevent the assertion of any pre-emption right adverse to their interests. This cannot be considered as a sufficient excuse for not complying with an indispensible and essential condition of the law. It is further contended in his behalf, that as no adverse claim has attached to the land his failure to file within the required time should not be considered as fatal to his claim.

If such was the fact, then he "may have acquired an inceptive right thereto, dating from the filing of his declaratory statement." The lands in question is, however, included within the incorporated limits of the city of Omaha, under the act of incorporation of 2d Feb., 1857, and hence were not subject to pre-emption, except to such bona-fide claimants as had settled thereon prior to the date of incorporation, and could show a full compliance with all the requirements of the act under which they claimed such right. Shields having failed to comply with the requirements of the law, cannot avail himself of this exception.

504

The records of the local office show that in July, 1857, Shields filed a declaratory statement on SE. $\frac{1}{4}$ sec. 10, t'p. 13 N., r'g. 10 E., but subsequently withdrew it on the ground of a mistake in the description of the land; but I have not discovered any evidence of such mistake. On the contrary, it is evident from the whole testimony that his object in filing was to procure the very tract described in said statement; and the evidence supports the opinion that he desired to secure the possession of both that tract and the one in question. Soon after his settlement on the land in dispute he sold his improvements made thereon, and moved to a distant part of the Territory, and continued away until about the 1st of Sept., 1857, when he returned and moved with his family upon the disputed tract. On the 22d Sept., 1857, the tract he first filed upon was entered by Thos. Hawes, and on that very day was deeded by him to Shields, which strongly corroborates the testimony of some of the witnesses that Shields had said that "he intended to have the land pre-empted by another for his benefit."

505

It is further testified that he promised to execute deeds to certain parties of a portion of the land in dispute, as soon as he could perfect his pre-emption thereto; and we find that two days after his entry he, with his wife, executed a warranty deed of an undivided one-half of this very tract; a similar deed to another party on 26th Jan'y, 1858; and on 2d Dec., 1857, only a few days after his entry, a similar deed to certain lots in a portion of the tract, the numbers of which, as well

as that of the block in which they are located, correspond exactly with similar ones on the plat of the city of Omaha filed in the case, thus showing that this entry of the land was not as a bona-fide pre-empt "to appropriate it to his own exclusive use and benefit," but to sell the same on speculation; a conclusion supported from this fact, that at the date of the reinvestigation of this case he
506 was residing on the land he had previously purchased.

Your decision cancelling the entry is therefore affirmed, and the papers are herewith returned.

Very respectfully your ob't servant,

J. THOMPSON, *Secretary.*

Commissioner of the General Land Office.

Endorsed: F. 33,290. Hon. Sec. of Interior, May 5, '60. Return the papers in the pre-emption case of Robert Shields, Omaha dist., R. 8, 228, May 12, '60. See letter to R. and R., May 15, 1860. Allan.

507 DEPARTMENT OF THE INTERIOR,
Washington, Dec. 24th, 1862.

SIR: I have carefully examined the argument of counsel in the case of Morrell *et al. vs.* Robert Shields, contestants for a tract of land in the Omaha district, Neb., which have been filed since the decision of this department of Dec. 13th, 1861, and also the affidavits which have been filed.

Neither the evidence or the arguments presents sufficient reason, in my judgment, for reversing the decision then made. The entry of Shields is sustained by equitable as well as legal principles.

The decision of Dec. 13th, 1861, will be adhered to, and you will in accordance therewith issue a patent to Robert Shields for the land in controversy.

Very respectfully, &c.,

CALEB B. SMITH,
Secretary.

The Commissioner of the General Land Office.

Endorsed: G. 10,637. Hon. Sect'y of Interior, Washington, D. C., Dec. 24, 1862, returns the papers in the pre-emption contest between Morrell *et al. vs.* Robert Shields, contestants. R. P'r D., Dec. 26, 1862.

508 GENERAL LAND OFFICE,
April, 22d, 1859.

Charles E. Sherman, present:

SIR: In compliance with your request, per letter of 16th inst., I enclose you herewith a copy of the memorial of the mayor and city council of Omaha city, asking reinvestigations of the claims of certain pre-emptors within the corporate limits of said city, which me-

morial was, in part, the subject of my letter to the register and receiver at Omaha, N. T., dated March 6th, 1858.

Very respectfully, &c.,

THOS. A. HENDRICKS,
Commissioner.

To the honorable the Commissioner of the Gen. Land Office.

Your memorialist, the city council of Omaha, beg leave to call your attention to the following statements:

In the spring of 1857, soon after the opening of the district land office at this place, a member of this council prepared a map of the city of Omaha, similar to the one herewith transmitted, marked "C," and filed it with the register of said land office.

A township plat similar to the one herewith transmitted, marked "D," was also filed with the said register, both maps, as your
509 honor will observe, showing plainly the different subdivisions of the government lands included within the corporate limits of said city of Omaha.

These plats having been thus filed in the register's office, were thought by your memorialists to be sufficient proof that the said parcels of land were actually selected and laid out as town or city site, and were thus exempt from the action of the pre-emption act of 1841, and that the said plats were sufficient protest against filings or entries being made under said law by individuals upon any of the tracts so designated.

Very soon after the opening of said land office it became known to your memorialists that the register was permitting individual filings upon some of said tracts, and encouraging pre-emptions thereon. Whereupon one of your memorialists called personally upon the said register, at his office, and made the enquiry: "Can individuals prove up upon any part of this town-site?" To which he replied in substance: "I am obliged to receive filings whenever offered, but no one can prove up without giving notice by publication in a newspaper for at least two weeks, so that every one interested may have a hearing."

Soon after this conversation your memorialists learned that
510 Samuel E. Rogers had proved up upon the N ½ of NW ¼ of sec. 26, and the NE ¼ of NE ¼ of NE ¼ of sec. 27, all within the said city limits, and it is well known by your memoralists that he did not give any public notice of said intention, and that the entry was made so quietly that it was not known to the public for some days after. Subsequently other entries were made in the same manner. We will mention those of M. R. Philips, F. W. Lewis, Herman Glass, J. B. and Wm. Bennett, all of which and many others were made without giving any public notice.

Under these circumstances the citizens of Omaha, becoming convinced that the register of the land office would permit all, or the greater part of the city property to be so pre-empted, greatly to the injury and damage of the property-owners and occupants, who had expended many thousand dollars in the purchase of city lots, and in

erecting valuable improvements, determined to ask certain parties to pre-empt certain tracts and convey the same in trust for the owners and occupants thereof to the city of Omaha in its corporate capacity, well knowing that pre-emptions under the circumstances, and on land selected as a city site, would not be in accordance with the pre-emption act of 1841, but rather choosing between two evils, preferring to have the entries made by friends, men on whom they
511 could rely, and who owned improvements on the tracts they sought to enter, rather than by enemies of the city and irresponsible, worthless characters on whom no reliance could be placed.

This appearing to be the sentiment of the citizens, the city council, when asked, reluctantly consented to approve the course, and did agree to accept the trust, and subsequently did accept the trusts of the lands entered by Thomas Davis, John L. Edwards and James W. Van Nostram, and no more. Subsequently, nearly all the lands that remained unentered at that time were pre-empted by parties who failed to convey in trust, and several of said parties or their assigns have since left the country, we fear never to return.

Those parties who so pre-empted, who have made deeds to lot-owners, have demanded an exorbitant price therefor, and then give in effect a quit-claim title. In view of the foregoing facts, and that justice may be meted out to all, we, your memorialists, ask and pray your honor that you will, without delay, vacate and set aside all the entries which have been made within the corporate limits of the city of Omaha, under said pre-emption act of 1841, and that you will instruct the officers of the land office at this place, in such man-
512 ner that it can in no event, and under no circumstances, be misconstrued, to permit no filings nor entries within said city limits, so that the same may remain vacated until the public land sales, feeling confident, as we do, that we will then be able to secure the home and property of our citizens to the satisfaction of all, and procure a title beyond doubt.

And your memorialists further ask that no patents may be issued upon any of said entries, as we have good reason to believe that the late register in this office, John A. Parker, has now gone to Washington to procure the issue of patents to some of these tracts, in advance of the regular order of their issue. And your memorialists further pray that you will restore to the aforesaid Thomas Davis, John S. Edwards and James W. Van Nostrand their pre-emption rights.

And your memorialists further pray, that in case any of the aforesaid pre-emptions, within the said city limits of Omaha, are returned to this office for a reinvestigation, that the hearing of the same will not be before the present register of said office, for the reason that he did, as attorney for the claimants, while his father was
513 register, received large fees in one or more of the said pre-emption cases within said city limits.

We desire to call your attention to accompanying papers, marked as shown in the margin:

A. Motion to raise a committee to examine certain pre-emptions.
B. Petition of R. W. Sypher, and 24 others.

C. Map of the city of Omaha.
D. Township plat, showing city boundaries.
E. Deed, Barton Green to J. M. Lowe.
F. Deed, Barton Green to J. M. Lowe.
G. Deed, Barton Green to J. M. Lowe.
H. Deed, E. Jeffries to J. M. Love & Co.
I. Deed, Geo. E. Nichols to Lowe, Bayliss & Jackson.
J. Deed, M. C. Gaylord to J. M. Love & Co.
K. Deed, H. Johnson to J. M. Lowe & Co.
L. Deed, H. Johnson to J. A. Jackson.
M. Deed, Hepner & Bozers to J. M. Love & Co.
N. Deed, C. W. Bozers to the Omaha City Co.
O. Deed, I. M. Thayer to Omaha City Co.
P. Affidavit of Larin Miller, in location of Omaha.
Q. " Wm. H. Byers, " "
R. " C. H. Down, " "
S. " B. R. Fulsom, in case R. Shields.
T. " Wm. R. Demarest, "
U. " Lorin Miller,
V. " Lorin Miller, case of J. A. Horbeck.
W. Affidavit of C. H. Down and Wm. N. Byers, Christie Krieb.
514 X. Deed of J. N. Horbeck and wife to H. Green.
Y. Petition of Thomas Davis.
Z. Petition of Jas. W. Van Nostram.

JESSE LOWE, *Mayor.*
THOMAS D. CONNOR,
J. H. KILLAN,
C. H. DUNN,
JAMES CREIGHTON,
H. H. VISSEHER,
THOMAS DAVIS,
WM. H. BYERS,
Members of City Council.

Endorsed: Memorial of mayor and city council of Omaha, copy of.

515 DISTRICT OF COLUMBIA, *Washington City, ss:*

Findley Bigger, being first duly sworn, deposes and says: I am on of the attorneys representing the interest of Robert Shields and his assignees to the pre-emption made by said Shields to certain lands, being in section No. ten and fifteen, in township No. fifteen north of range No. thirteen east, in the Territory of Nebraska, at the Omaha land office, in 1857.

It appears from the affidavit of James D. Test, one of the assignees of said Shields, that he transmitted to me by mail the duplicate certificate of location or entry to my address at Washington city, D. C., which I have never received to my knowledge, and I have searched my office papers and books with great care, and am unable to find the same; and deponent further says that he believes the said certificate is lost, and further deponent saith not.

FINLEY BIGGER.

Sworn to and subscribed before me this 19th day of February, A. D. 1863.

[SEAL.] N. CALLAN, *J. P.*

Endorsed: This paper filed by John J. Reddick, pre-emp. div.

516 THE STATE OF IOWA, *County of Pottawattomie, ss:*

I, James D. Test, being duly sworn, deposes and says, that the duplicate cash certificate of Robert Shields for the land entered by said Shields for pre-emption, in 1857, in township 15 N., range 13 east, in Nebraska Territory, was, soon after the entry by the said Shields delivered to me by said Shields, and that there was no assignment of said certificates by Shields, or any one else, and that I transmitted said certificate, by mail, to Finley Bigger, directed to Washington city, D. C.

JAMES D. TEST.

Sworn to before me, this 17th day of March, A. D. 1862, by James D. Test, who subscribed to the same.

[SEAL.] TH. J. LATHAM, *Notary Public.*

Endorsed: This paper filed by John J. Reddick, pre-empt. div.

WASHINGTON, D. C., *Feb.* 19, 1863.

To the Hon. J. M. Edmunds, Com. of General Land Office, Washington, D. C.

SIR: Robert Shields, the pre-emptor of land near Omaha, Nebraska, has resided in Douglass county, in Nebraska, for six or seven years. I am informed that he has lately gone to Nevada
517 Territory.

I have been acquainted with Robert Shields since the year 1857. From my personal knowledge of him, I believe him to be a patriotic citizen, loyal to the government of the United States.

Very respectfully, your ob't servant,

DAVID L. COLLIER,
U. S. Dist. Att'y for Nebraska.

DISTRICT OF COLUMBIA, *Washington City, D. C., ss:*

J. A. Horbeck, being first duly sworn, deposes and says: I have been a citizen of Nebraska Territory for the past six years, and during that time have known Robert Shields, and know him to be a Union man—unconditionally so—and was at the time he left said Territory for the mining regions of Nevada Territory, and no doubt is at the present time; and deponent further says, that up to this time the said Shields has not returned from Nevada, and therefore his oath of allegiance cannot be obtained at this time. And further deponent saith not.

J. A. HORBACH.

518 WASHINGTON, *Feb.* 18, 1863.

Hon. J. M. Edmunds, Com. of Gen. Land Office:

DEAR SIR: I am well acquainted with Robert Shields, the pre-emptor of certain land near Omaha, Neb., and believe him to be a good, loyal citizen.

Most respectfully,

S. G. DAILY,
Delegate N. T.

TERRITORY OF NEBRASKA, *County of Douglas, ss*:

I, J. W. Paddock, clerk of the District Court in and for said county, do hereby certify that the annexed instrument is executed and proved or acknowledged in due form, according to the laws of the Territory of Nebraska, to entitle it to be recorded therein; also that G. C. Morrell, before whom the same was proved and acknowledged, was, at the time of taking such proofs or acknowledgment, a notary public in and for said county, duly qualified and authorized to take the same. And I further certify that I am well acquainted with the handwriting of the said G. C. Morrell, and verily believe the signature to the said certificate is genuine.

Witness my hand and the seal of said court, at Omaha, this third day of February, A. D. 1858.

[SEAL.] J. W. PADDOCK, *Clerk.*

519 Benj. K. Folsom, being duly sworn, doth depose and say: That on or about the middle of September, 1857, Robert Shields, who afterwards pre-empted a portion of the city of Omaha, said to him that he was about entering into a speculation, viz., to pre-empt a ¼ section in said city of Omaha, and have fixed every thing already, and that if he, said B. R. Folsom, would make no opposition, he, Shields, would deed him all the lots to which he, Folsom, had claim, viz., about 30 lots which said Folsom bought of Omaha City Co., about a year since; and said Folsom further testifies that Shields told him since the pre-emption, that he, Shields, had paid his lawyer $250 to get his pre-emption through.

B. R. FOLSOM.

Subscribed and sworn to before me this 29th day of December, A. D. 1857.

[SEAL.] G. C. MORRELL,
Notary Public for Douglass Co., Omaha.

Endorsed: "S." Affidavit of B. R. Folsom, in case of Robert Shields.

520 TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, J. W. Paddock, clerk of the District Court in and for said county, do hereby certify, that the annexed instrument is [annexed instrument is] executed and proved or acknowledged in due form according to the

laws of the Territory of Nebraska, to entitle it to be recorded therein; also, that J. W. Van Nostrand, before whom the same was proved and acknowledged, was at the time of taking such proof or acknowledgement, a notary public in and for said county, duly qualified and authorized to take the same. And I further certify, that I am well acquainted with the handwriting of the said J. W. Van Nostrand, and verily believe the signature to the said certificate is genuine.

Witness my hand and the seal of said court, at Omaha, this third day of February, A. D. 1858.

[SEAL.] J. W. PADDOCK, *Clerk.*

W. R. Demorest, being duly sworn, doth depose and say: That Robert Shields, the person who pre-empted W ½ of SW. ¼ of sec. 10, and the N. ½ of the NW. ¼ of sec. 15, town. 15 N. of R. 13 E. of 6th principal meridian, did promise and pledge to him that if he, Demarest, would not oppose his pre-emption, he, said Shields, would
521 deed him all the lots to which he, Demarest, had had title under the town filing, after he obtained government title to same.

W. R. DEMAREST.

Omaha City, Jan. 1858. Subscribed and sworn to before me this 5th day of Jan., 1858.

[SEAL.] JAS. W. VAN NOSTRAND,
Notary Public, Douglas Co. N. T.

Endorsed: 5 "T." affidavit of W. R. Demarest touching the pre-emption of Robert Shields. June 23, 1858.

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, J. W. Paddock, clerk of the District Court in and for said county, do hereby certify, that the annexed instrument is executed and proved or acknowledged in due form according to the laws of the Territory of Nebraska, to entitle it to be recorded therein; also that G. C. Morrell, before whom the same was proved and acknowledged, was, at the time of taking such proof or acknowledgement, a notary public in and for said county, duly qualified and authorized to take the same. And I further certify that I am well acquainted with the handwriting of the said G. C. Morrell and verily believe the signature to the said certificate is genuine.

522 Witness my hand and the seal of said court, at Omaha, this third day of February, A. D. 1858.

[SEAL.] J. W. PADDOCK, *Clerk.*

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

Lorin Miller, of the city of Omaha, county and Territory aforesaid, being duly sworn, doth depose and say, that Robert Shields the, person who pre-empted the west ½ of SW ¼ of sec. 10, and the north ½ of the NW. ¼ of sec. 15, township 15 north of range 13 east of the 6th principal meridian, did in substance promise and pledge to him said Miller,

that if he, the said Miller, would not oppose his, said Shields' pre-emption, he, said Shields, would convey to him, said Miller, all the interest which he, said Miller, had in lots in said pre-emption, and which he, said Miller, now held as city additions.

Further, that said Shields, since the pre-emption above specified was made, has admitted to said Miller that his assurance previously given did mean that he, said Shields, would give title deeds immediately after pre-emption. Further, that said Shields demanded exorbitant prices for said deeds, and that any deed from said Shields would be worthless in the judgment of said Miller.

LORIN MILLER.

523 Subscribed and sworn to before me this 19th day of January, A. D. 1858.

[SEAL.]

G. C. MORRELL,
Notary Public for Douglas Co., Nebraska.

Endorsed: 7th "U." Affidavit of Lorin Miller, touching the pre-emption of Robert Shields.

GENERAL LAND OFFICE, *January 12th*, 1859.

GENTLEMEN: I have received the receiver's letter of June 5th, 1858, enclosing testimony, arguments, and other papers pertaining to the entry of Robert Shields of the W. ½ SW. ¼ sec. 10, and N. ½ NW. ¼ sec. 15, T. 15 N., R. 13 east, contested by "Omaha City" company, an investigation of said case having been had at your office in May last, in pursuance of instructions from this office dated March 6, '58. In reply I have to state, that I have carefully examined all the testimony, together with the arguments of the attorneys in said case, and concur with the receiver in the opinion that the entry of Shields, No. 996, is illegal, and ought to be cancelled, for the reasons which are very clearly set forth in the receiver's letter. Said entry has, therefore, been cancelled, and you will be pleased to note the fact on your books and plats, and notify the party to apply for return of his purchase money in the usual manner.

524 Very respectfully,

THOMAS A. HENDRICKS,
Commissioner.

Endorsed: Letter to R. and R., Jan. 12, 1859.

GENERAL LAND OFFICE, *February* 1, 1860.

Hon. J. Thompson, Sec. of the Interior:

SIR: In the matter of the pre-emption claim of Robert Shields, contested by the city council of Omaha city, I have the honor to submit the following report, together with all the papers in the case:

On the 21st of November, 1857, Robert Shields entered as a pre-emption, at the Omaha land office, the W ½ of SW ¼ of sec. 10, and N ½ of N W ¼ of sec. 15, T. 15, R. 15 east, all within the corporate limits of Omaha city. His proof set forth that he commenced his

settlement on or about the 15th of April, 1856, (prior to the incorporation of Omaha,) by laying the foundation for a dwelling house; that since then he had completed said house, and moved into it on or about 1st of Sept., 1857. The record shows that he filed his declaratory statement on the 15th of Sept., 1857. Otherwise the original proof was satisfactory enough. Soon after his entry, however, memorials and affidavits were forwarded to this office on the part of the city
525 council of Omaha, setting forth that the entry of Shields and many others were in the corporate limits of the town of Omaha; that they embraced valuable improvements, &c., belonging to the city, and to private individuals holding by deed from the city. In consequence of these memorials and affidavits a general order was given per letter from this office of 6th March, 1858, (copy herewith,) to the register and receiver, to reinvestigate the case in question. Accordingly on the 10th of May, 1858, a hearing of the case of Shields was commenced before the receiver, the register declining to act and all parties consenting, and continued from day to day until concluded. (See report of the receiver of 5th June, 1858, herewith.) During the investigation the following state of facts was elicited, to wit:

1st. The land entered by Shields was at the time of the entry included in the corporate limits of the town of Omaha, and was surveyed into streets, lots, blocks, and alleys, but was not improved so as to prevent a bona-fide settler from entering the same by preemption under the then ruling of this office, the said land not being included within the 320 acres claimed by the town of Omaha under the act of 23d May, 1844.

526 2d. Shields having purchased some lots from the town authorities, included in the W ½ of SW ¼ sec. 10, and N ½ of NW ¼ sec. 15, built a house thereon in May, 1856, but did not occupy it. In June, 1856, he sold the house and lot, with several other lots adjoining, to John Beeson, (see doc. F.,) for eleven hundred dollars, whereupon Beeson took posession, and occupied said premises until the fall of 1857.

3d. In July, 1857, Shields filed his declaratory statement upon the SE ¼ of sec. 10, T. 13, R. 10 east, several miles from Omaha, alleging settlement thereon April 10th, 1857. Subsequently he withdrew the filing, alleging mistake. (No date to withdrawal.)

4th. On the 15th of Sept., 1857, Shields filed his declaratory statement on the tract in question in the corporate limits of Omaha, alleging settlement in April, 1856, and on 21st Nov., 1857, he entered the same. Soon afterwards he conveyed these tracts away by deed, and it seems returned to the tract upon which he had first filed.

5th. By the parole testimony of J. C. Hileman it appears that before Shields proved up and made entry, he repurchased the house from Beeson which he had sold to him in 1856, but of this there is no record evidence, and nothing is said of the lots sold by Shields, as per Doc. F. This sort of testimony would be inadmissible
527 in any court of law. It is evidence merely of a ruse on the part of Shields to evade the restrictions of the 13th section of the act of 1841.

Upon these points, together with the general appearance of speculation and defiance of the spirit of the law of 1841, which apparently characterized every movement of Shields, this office cancelled the entry of said party, in accordance with a long-established custom in such cases, and so notified the register and receiver per letter from this office dated Jan'y 12, 1859. (Copy herewith.)

From this decision and action Mr. Charles E. Sherman, att'y for Shields, appeals to you, upon the grounds set forth by him in his statement under date of 8th June, 1859, (herewith,) in suport of which he has filed three extended, searching, and ingenious arguments, which are also enclosed herewith. The grounds of Mr. Sherman's appeal are enumerated in twelve points of exception, which are briefly condensed as follows:

1st. That upon the mere report of the receiver this office assumed and exercised the power to cancel the entry of Shields, which power Mr. Sherman denies.

2d. That the order for a reinvestigation was not given to
528 the receiver, but to the register and receiver to act jointly, which they did not do.

3d. That the order for reinvestigation only authorized "actual occupants and settlers" to contest Shields' entry, whereas no actual "occupants and settlers" appeared to contest, while those reported not to be such did appear and were permitted to contest said entry.

4th. That all action by the receiver alone upon said case is in violation of law and void, and the concurrence of the Commissioner equally so.

5th. That this case according to our express instructions, per letter of 6th March, 1858, has been treated and proceeded upon as one arising under the 11th section of the act of 4th Sept., 1841, whereas this case does not arise under said section, because there were not "two or more persons" settled on the land in question; hence the cancellation was not in accordance with law, and is therefore void.

6th. That by the 12th section of the act of 1841, the reg. and rec'r are constituted the sole judges of the facts which entitle a settler to a pre-emption; and their decision is not subject to the review of any other officer of the government; especially, that their decision cannot be affected by the action of the receiver alone, &c.

529 7th. That the affidavit of the claimant under the 13th section of the act of 4th Sept., 1841, is conclusive upon the land office, and the question of false swearing is left to the judicial department. That hence the cancellation of Shields' entry upon the ground of false swearing, in the face of the affidavit, is illegal, unauthorized and void, in the absence of conviction on that point by the courts.

8th. That during the investigation the receiver exhibited gross partiality, excluding material evidence for the defence, &c., as shown by affidavits of Samuel Clinton and others.

9th. That in the decision of this case the affidavits of Samuel Clinton and others were not taken into consideration, as they should have

been—the case, in Mr. Sherman's opinion, not arising under the 11th section of the act of 1841.

10th. That in the unauthorized action of the receiver and the Commissioner, weight was given to illegal testimony offered and improperly received against Shields.

11th. That the receiver, even if he had power, gave no decision from which an appeal could be taken, or which the Commissioner could properly have confirmed.

12th. That the land on which Shields settled was by law
530 subject to pre-emption at the time of his settlement, (which we admit;) that Shields was the only settler thereon; that he complied with all the requirements of the pre-emption law, and is therefore clearly entitled to enter the same; that consequently the cancellation of his entry was unauthorized by law, and void; but if authorized, was unjust and in violation of the legal and equitable rights of said Shields.

To these points of exception, which are ably argued, I have to reply as follows:

1st. The register and receiver, it is true, were directed to reinvestigate the case of Shields, and it was their duty to consider the testimony elicited in conjunction and to express a joint opinion thereon, provided they could agree in opinion. The register however, "declined to act officially in the case, he having prior to his appointment been employed as an attorney in the case. This fact was made known to the parties prior to the commencement of the trial, all of whom consented to his withdrawal." (See receiver's report herewith.) Under these circumstances the non-action of the register was simply considered as a failure of the register and receiver to join in opinion,
an every day occurrence, in which case such failure is viewed
531 as a rejection or decision against the claims of all parties to the contest. Then, upon an appeal being taken, as was done in this case by Shields, this office uniformly acts upon the case as though both register and receiver had expressed a decision adverse to the claims of the parties to the contest.

But supposing this course of action erroneous, we claim the power, under the first section of the act of 4th July, 1836, to "supervise and control" the original action of the register and receiver; and upon the discovery of a position violative of the pre-emption law on the part of a pre-emptor, (whether known to the register and receiver or not at the time such pre-emptor may have made his entry) to set aside or cancel the illegal pre-emption.

The power to suspend and cancel erroneous and illegal entries we conceive is fairly incident to the power of supervision and control conferred upon the Commissioner by the act of 4th July, 1836. The question of our right to judge and determine whether or not a pre-emption entry is illegal and void, will be considered in its order.

2d. Mr. Sherman's second exception is answered in the foregoing.

532 3d. I do not consider Mr. Sherman's third objection sufficiently strong to overturn our action in the premises. Whether so expressed or not, it was understood here, at least, that the city

council of Omaha, as the representative of all the claimants and occupants adverse to the pre-emptors, should conduct the investigations on the part of such claimants and occupants. Further than this, it is customary, and is an executive privilege, in reinvestigating pre emption cases, to admit parties to the record as witnesses for the government, if there is no legal adverse claimant The strict rules of evidence observed in courts cannot always be followed, for obvious reasons. This seems also to have been the understanding by the parties at Omaha; Mr. Shields did not object to the appearance of the city council attorneys to conduct the prosecution, and since neither Shields nor his attorney raised such an objection at that time, I am of opinion, that it is too late for it to be raised now, more than a year after the hearing was had. Further than this, it is believed by this office that the city council of Omaha city had a right under the act of 1841 to contest all claims by private pre-emption within the corporate limits of said city; it being left of course to the register
533 and receiver, and to this office, to determine, subject to an appeal, whether or not the pre-emption right should be sustained.

4th. By his fourth exception, Mr. Sherman surely does not mean to say that a witness may not be examined by the receiver alone. If such a doctrine should benow established, it would invalidate four-fifths of all the pre-emption entries made at many of the district land offices, where the great pressure of business will not permit both the receiver and register to unite in the examination of every witness introduced in support of pre-emption claims, whether contested or not. In fact, testimony in ex-parte and in contested cases is o ten taken before justices of the peace and other competent civil officers, and then submitted to the land officers, who pass upon it as if taken before themselves. Express authority for this is given in the circular from this office, dated Sep. 15, 1841, under and by virtue of the 12th section of the act of 1841, which makes it incumbent upon the Secretary of the Treasury (now of the Interior) to prescribe rules, regulations, &c., for the government of the district offices in adjudicating pre-emption claims.

This question being settled, and if not intended to be raised
534 by Mr. Sherman, objection as to the authority of the receiver to pass upon the testimony and of this office to supervise and determine the case upon such testimony, is answered in our reply to his first exception.

5th. The fifth objection is answered under the 1st and 4th heads of the foregoing.

6th. Mr. Sherman's sixth exception is the leading and controlling one. It is the great burden of his argument. In it he takes the bull by the horns; he is emphatic and confident of his strength, and boldly denies our right to cancel any pre-emption entry once allowed by the register and receiver. "The register and receiver," he says, "are constituted the sole judges of the facts which entitle a settler on the public lands of the U. States to a pre-emption, and their decision is not subject to the revision of any other officer of the gov-

ernment." This assertion is supported by an ingenious, but, I think, untenable train of arguments. "The 12th section of the act of 1841," says Mr. Sherman, "declares that proof of the settlement and improvement required shall be made to the satisfaction of the register and receiver of the land district in which the land may lie, agreeably to such rules as may be prescribed by the Secretary
535 of the Treasury," (now Interior.) "This provision," he continues, "is copied from the 3d section of the act of 29th May, 1830, and necessarily requires the same construction." He then proceeds to quote from an opinion of Attorney General Wirt, expressed on the 28th of August, 1819, and referring to the pre-emption act of 12th April, 1814, to show that under that act there was no revisory or controlling power. Next we have a quotation from Attorney General Butler, in which he takes the ground that a decision of the register and receiver touching pre-emption rights under the act of 29th May, 1830, "is conclusive." Next our attention is directed to the nine rules of President Jackson, established under the advisement and with the approbation of Levi Woodbury, then Secretary of the Treasury, and of Attorney General Butler, which nine rules pertained to the act of 29th May, 1830, and were promulgated May 6th, 1836. Next Mr. Sherman alleges that his view of the law is sustained by the Supreme Court of the United States, and quotes a short extract from the decision in the case of Lytle *et al. vs.* The State of Arkansas *et al.*—(9 Howard, p. 333.)

By these opinions, these nine rules, and this decision, he has
536 erected a bulwark which he thinks impregnable.

He has shown that the 12th section of the act of 1841 is in effect identical with the 3d section of the act of 1830; he has shown that Attorney General Wirt thought there was no higher power than the register and receiver under the act of 1814; that Attorney General Butler, Levi Woodbury, and President Jackson were of the same opinion relative to the act of 1830; and he has quoted from a decision of the Supreme Court to the same effect relative to a pre-emption case arising under the act of 1830, and which was allowed in 1834; ergo, the same opinion, rules, and decisions must apply with equal force to the act of 1841. In all this the force and intent of the 1st section of the act of 4th July, 1836, is overlooked. He forgets that this law, passed subsequent to the delivery of the opinions of the Attorneys General Wirt and Butler, subsequent to the nine rules of President Jackson, and subsequent to the adjudication by the register and receiver of the case upon which the decision of the Supreme Court was given, as reported in 9th Howard, p. 333, gives the very power which his authorities deny to us under the act of 1830; however, he awakens afterward in his supplemental argu-
537 ment to a recognition of the right of "supervision and control" conferred upon the Commissioner of the General Land Office, and to the fact of the recognition of that "supervision and control" by the Supreme Court, in the case of Barnard's heirs *vs.* Ashley's heirs *et al.*, reported in 18th Howard, p. 45; but here Mr. Sherman's ingenuity does not forsake him. He contends and with con-

siderable plausibility, that "this supervision and control" only applies to contested cases, where two or more parties have settled upon the same tract of land, and are each contending for a pre-emption right to the same. Mr. Sherman is a lawyer of unquestioned ability, but here I am of opinion his sagacity and analytical perception are at fault. The 1st section "of the act of 4th July, 1836, declares," that from "and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands * * * * shall be subject to the supervision and control of the Commissioner of the General Land Office under the direction of the President of the United States."

Remarking upon this provision, the Supreme Court, while considering the case of Barnard's heirs *vs.* Ashley's heirs *et al.*, uses the following language: "The necessity of supervision and control vested in the Commissioner, acting under the direction of the Presi-
538 dent, is too manifest to require comment, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish, by ex-part affidavits, cultivation and possession of particular quarter sections of land, when the fact are untrue; that the act of 1836 modifies the powers of register and receiver to the extent of the Commissioner's action in the instances before us, we hold to be true; but if the construction of the act of 1836 to this effect were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety."

This language is "too manifest for comment," further than to say that it effectually upsets the doctrine maintained by Mr. Sherman. So far from deciding or intimating that the "supervision and control" conferred on the Commissioner by the act of 1836 is confined to contested cases, or cases where there are two or more claimants to the same tract of land, the court instances ex-parte cases, where this "supervision and control" is palpably necessary. Nothing is more easily done than apparently to establish by ex-parte affidavits cultivation and possession, &c., "when the fact is untrue," and nothing is more easily done than for a speculative pre-emptor to swear falsely, as Shields is shown to have done; nothing is more easily done than for a speculative squatter to move from one tract another, file different declarations, sell out, make another, claim prove up, and enter, in defiance of law, where registers and receivers are culpably ignorant or careless. In such cases, indeed, the necessity for
539 the exercise of "supervision and control" is too manifest for comment. But let us look into the decision of the Supreme Court reported in 9th Howard, p. 333, upon which Mr. Sherman places his chief reliance. By doing so we will discover that Mr. S. quoted only so much of that decision as suited his purposes, leaving out some very material provisons. Speaking of the law of 29th May, 1830, while considering the case of Lytle *et al. vs.* The State of Arkansas, the court says, "The register and receiver were constituted by the act a tribunal to determine the rights of those who claimed

pre-emptions under it. From their appeal no decision was given." This much of the appeal Mr. Sherman quotes. But the context modifies this statement very much, and Mr. S. ought not to have overlooked that fact. Immediately following the above-quoted language, the court proceeds, "If therefor they (the register and receiver) acted within the powers, as sanctioned by the Commissioner, and "within the law, and the decision cannot be impeached on the ground of unfairness; it must be considered final." These are important exceptions, and after all modify the decision of the court to this extent, viz: if under the act of 1830 a pre-emptor makes an entry, having complied with the law in every particular, the action of the register and receiver is final. Very well. That much finality we concede to the action and decisions of the register and receiver under the act of 1841. The 12th section of the latter act declares,
540 "That, prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie, agreeably to such rules as shall be prescribed by the Secretary of the Treasury," (now Interior.) Very well again. But suppose the register and receiver neglect or purposely waive the "rules" prescribed by the proper department, how then? Does not the very power to establish rules carry with it the power to enforce them? If the power is given to the Secretary of the Interior to prescribe rules regulating the entry of pre-emptions—if those rules are prescribed and are disregarded by the register and receiver, has not the department the power to enforce them? Or if the case is such that such rules cannot be enforced, is it not by the operation of the law null and void? and if null and void, can we not cancel the entry? These questions seem to carry with them their own answer. But to quiet and forever settle any doubt or quibble on the subject, the 1st section of the act of 4th July, 1836, steps in and confers upon the Commissioner of the General Land Office (the proper office of the Interior Department) the power of "supervision and control" over all the executive duties of the register and receiver. Now the adjudication of pre-emption claims by the register and receiver
541 is an executive duty, and nothing else, and when in the discharge of such executive duty they permit entries in flagrant violation of the laws and instructions they are sworn to execute, it becomes the duty of this office, as a higher executive power, having "supervision and control" by law either to enforce the law of Congress and the rules of the department made in conformity to such law, or else, to set aside, to cancel, the illegal entry. For a period of more than 20 years this power has been exercised, subject, of course, to appeal; the letter, spirit, and common sence interpretation of the law justifies the proceedure, and in view of the great number of frauds daily committed "under the pre-emption laws, the practice of the office could not be disturbed without manifest impropriety." The matter of cancellation, the bugbear in the Shields case, is merely a resultant of the law. If an entry is null and void under

the law, as we believe the entry of Shields to be, our action in writing the word "cancelled" across the face of the certificate is simply an evidence of our decision under the law. The certificate in fact stands cancelled by the law, when it cannot be approved or saved by the act of 26th June, 1856.

7th. Mr. Sherman's seventh exception is an important one. He holds that the "affidavit of the pre-emptions under the 13th section of the act of 1841 is conclusive upon the Land Office," and any question arising under said section is left to the judicial department. Such a construction, I do not believe, was intended by Congress;
542 it is "conclusive," no doubt, when no testimony is brought before this office or the local office of its falsity. In a converse case, however, I have no doubt that Congress intended to confer the judicial power involved in the case upon the General Land Office, at least so far as the forfeiture of the land is concerned. The whole pre-emption system is by law lodged in the General Land Office, subject to the direction of the Secretary of the Interior, and the President of the United States; the Commissioner is made executor and judge of the laws, and as a consequence it is left to him to determine from the evidence whether or not in any given case a pre-emptor has forfeited his pre-emption right. If this position be untrue, the fact does not materially strengthen the appeal in the Shields case. There is enough testimony to cancel his entry outside of his bargain and sale, made prior to the date of his entry. But here let me say that the practice of the office, ever since the passage of the law of 1841, has been to take cognizance of false swearing by pre-emptors, when made manifest by documentary evidence and to cancel all entries effected by such false swearing, in conformity to what has been understood as the positive requirement of the act of 1841. Secretary McClelland took the view herein given in his letter to this office, dated July 11, 1856.

8th. The eighth exception is one of no particular importance; if well taken, it does not affect the case, since the record evidence in the case is that which caused the decision against him, and
543 which the parol testimony which Mr. Sherman complains was ruled out would not have changed or modified as to have affected the decision of this office.

9th. The ninth objection is only another expression of the eighth. The affidavits of Samuel Clinton and others set forth the testimony which the receiver ruled out, and which we did not choose to consider here for the reason set forth above.

10th. The tenth exception is not, in my opinon, sustained by the facts in the case, at least so far as the action of this office is concerned. It is believed that the record evidence in the case is sufficient to justify our decision. The corrobatory parol testimony is merely cumulative.

11th. The eleventh objection is embraced and answered in our reply to the first.

12th. To the twelfth exception I have only to reply, that from the foregoing it will be seen that in the opinion of this office Mr. Shields

not only did not comply with the requirements of the pre-emption law, but proceeded in violation of its provisions. In mitigation of this it is urged that Mr. Shields was prevented or deterred from complying with the law by the Omaha Claim Club. The malevolence, the despotism, the barbarism, and brutality of that club are set forth in the black and bloody colors they deserve. But in the case of Mr. Shields, I am of the opinion that the terrible "club" is made use
544 of merely as a "scape goat." If the club was so dreadfully severe upon Mr. Shields, why was it so tolerant to Beeson, his assignee? They did not drive Beeson off the land; neither did they attempt to do so, nor did they drive Mr. Shields off or attempt to do so; he remained in quiet possession of his ten lots which he had purchased from the town of Omaha until he concluded to pre-empt the quarter section within which they were situated; then he was advised that it would be unsafe for him to file his declaratory statement thereon; whereupon in great terpitude he sold out his house and tne lots to Beeson, left the place, selected another claim out of the city, filed upon that, remained upon it for several months, abandoned it of his own accord, returned to Omaha, pretended to repurchase his house from Beeson, filed his declaratory statement in September, 1857, (18 months after his alleged settlement,) and proved up on the 21st Nov., 1857, immediately after which he commenced selling out his valuable town lots, and no doubt made a handsome speculation "for his own use and benefit." Mr. Sherman complains that we did not take into consideration the ex-parte affidavits of Samuel Clinton and others in behalf of Shields, neither did we consider the affidavit of B. R. Folsom ("S" herewith) in which Shield's speculative propensities are exhibited, nor did we consider the testimony of J. C. Johnson, (p. 33,) in which he states "he heard Shields say he had hired a man to prove up for him on the Elkhorn the claim which he (Shields) abandoned just before returning to Omaha.

545 In addition to the foregoing I have to say a few words relative to the filing of declaratory statements. When a party settles upon a tract of land, and files his declaratory statement, he can correct or amend the filing, if he has erred in the description of his claim, but no authority has been given for a man to withdraw his filing at his own option, and then settle upon and file for another tract. The 4th section of the act of 1843, and the circular of Dec. 3, 1856, forbids such a transaction. If a settler files on a tract, or abandons or sells the same, he has concluded, he has exhausted his rights, and if he files upon and enters another tract under the pre-emption law of 1841, he does so in violation of that law. Such has been the uniform ruling of this office. With these remarks I have the honor to submit the case of Shields, and respectfully recommend a careful examination of all the points raised by the attorneys of Mr. Shields, and the views of this office relative to the same.

Very respectfully, S. A. SMITH, *Commissioner.*

Endorsed: Robert Shields, "Omaha City." C. E. Sherman. See reply of Sec. on special files, May 5, 1860, and letter to R. & R., May 15, 1860.

546 WASHINGTON, *8th June*, 1859.

Hon. Thos. A. Hendricks, Com'r of the Gen'l Land Office:

SIR: In the case of Robert Shields, who claimed and was allowed "by the register and receiver of the land district" a pre-emption on the west half of the SW. quarter of section 10 and the north half of the NW. quarter of section 15, in township 15 north, range 15 east, in Nebraska Territory, and which pre emption you have, upon the mere report of the receiver of said land district, directed to be cancelled and annulled, I hereby pray an appeal from your decision to the Hon. Secretary of the Interior. The grounds of this appeal are—

1st. That upon the mere report and reinvestigation of the receiver alone (the "register and receiver," alone, being authorized by the pre-emption laws to act upon pre-emption claims) you have assumed and exercised the power to order a pre-emption entry, allowed according to law, to be cancelled and annulled—a power not given you by the law, as I respectfully contend.

2d. Because the direction is given by you to the "register and receiver," by your letter of 6th March, 1858, and the power therein directed to be exercised was not given to the receiver but expressly as the law required to the "register and receiver" jointly which power has not been exercised according to your direction.

3d. Because your said letter of the 6th March, 1858, only
547 authorized "actual occupants and settlers" of the land in controversy to appear and contest upon such reinvestigation; whereas those reported by the receiver not to be "occupants or settlers" were permitted to appear and contest; and no "actual occupants or settler" did appear to contest in this case.

4th. Because all action by the receiver alone upon said pre-emption case is in violation of law and void; and the concurrence of the Commissioner of the General Land Office in such illegal and void action could not give it vallidity. It was also in violation of the express instructions and authority given by you in your said letter of the 6th March, 1858.

5. Because this case, according to your express instructions in your letter of the 6th March, 1858, has been treated and proceeded upon as one arising under the 11th section of the act of 4th September, 1841, which provides alone for cases where "two or more persons shall have settled on the same quarter section of land," in which case the law expressly provides that "all questions as to the right of pre-emption arrising between different settlers (on the same quarter section and none other) shall be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and revision by the Secretary of the Treasury," and by the act of 12th June, 1858, to the decision of the Commissioner of the General Land Office, with an appeal to the Secretary of the Interior.
548 Whereas this case does not arise under the said 11th section," because there were not "two or more persons" settled on the land in question, and hence the said action is not according to the law under which it has been had, and is therefore void.

6. Because by the 12th section of the act of 4th September, 1841,

the "register and receiver" are constituted the sole judges of the facts which entitle a settler on public lands of the U. States to a pre-emption: and their decision is not subject to the revision of any other officer of the government, and especially to the decision (or revision) of the receiver alone upon a reinvestigation ordered by the Commissioner of the General Land Office, and that an approval by the said Commissioner of an illegal and unauthorized act of such receiver alone cannot affect a right granted according to law by the register and receiver.

7th. That the affidavit of the claimant, under the 13th section of the act of 4th September, 1841, as to whether the claimant "has not settled upon and improved said land to sell the same on speculation but in good faith to appropriate it to his or her own exclusive use or benefit," and that "he or she has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever by which the title he or she might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself or herself," is to
549 be taken as conclusive upon the Land Office, and the question of false swearing ("perjury") as to any of the facts aforesaid (and the consequent penalties of such swearing to be enforced after conviction of perjury by the department) left to the decision of the judicial department; that hence the illegal and unauthorized opinion of the receiver, and its confirmation by the Commissioner of the General Land Office predicated thereon, as to any of these points, as stated in Shields' affidavit, is illegal, unauthorized and void; as in all action towards the annulment of Mr. Shields' entry, predicated upon the same, before such conviction.

8th. Because, on the reinvestigation the receiver displayed "gross partiality," and so conducted the reinvestigation as to exclude important and material testimony, which Shields was prepared to offer and desirous to have taken by said receiver, as fully appears by the affidavits of Samuel Clinton and others, sent to the General Land Office in this case.

9th. Because, in the decision of this case, the affidavits of said Clinton and others, showing the unfairness of the reinvestigation on the part of the said receiver and his exclusion of material and important testimony, was not taken into consideration by the Commissioner of the General Land Office, as they should have been, the case not being one of contest under the 11th section of the act of 1841.

550 10. Because, in the unauthorized action of the said receiver and in confirmation thereof by the Commissioner, weight was given to illegal and void testimony offered and improperly received against the said Shields.

11th. Because the said receiver, even if he had been authorized to act, by law, and under the instructions of the Commissioner of the General Land Office, without the register, gave no decision in the said case from which an appeal could properly have been taken or which the Commissioner could properly have confirmed.

12th. And finally, because the land on which Shields settled and made improvements was, by law and the decision of the Commissioner, subject to pre-emption, and because he was the only settler thereon and complied with all the requirements of the pre-emption law, and is, therefore, clearly entitled to enter the same; and because all the action had to cancel and annul his entry is unauthorized by law and void, but if authorized is unjust and in violation of the legal and equitable rights of the said Shields.

I have therefore most respectfully to ask, if you do not see fit to reconsider your action on this case, that all the papers in the same, including this appeal and the arguments herewith presented in support of the same, together with your letters of the 6th March, 1858, and of the 12th January, 1859, to the register and receiver
551 at Omaha, Territory of Nebraska, and such other evidence as exists in your office, showing illegal and unauthorized action and threatened violence against all pre-emption claimants within the extended corporate limits of the city of Omaha and without the "municipal pre-emption" granted to the said city, may be transmitted to the Honorable Secretary of the Interior for his action thereof, according to law.

Very respectfully, your obedient servant,

CHAS. E. SHERMAN,
Att'y for Robert Shields.

P. S.—I will thank you to send with this appeal a copy of the circular to registers and receivers under the act of 4th Sept. 1841, in relation to the finalty and conclusiveness on the Land Office of the oath of the pre-emption claimant, under the 13th section of the said act. This paper was issued by the Commissioner of the General Land Office under the instructions of the Hon. John C. Spencer, then Secretary of the Treasury, and bears date the 11th November, 1843.

CHARLES E. SHERMAN.

Endorsed: Robert Shields' grounds of appeal in 8th June, 1859. Jan. 13, 1859.

552 [Examined.]

CITY OF MAHA
vs.
ROBERT SHIELDS.

Reinvestigating the pre-emption only of Robert Shields to the W. ½ of the SW. ¼ sect. (10) and N. ½ of the NW. ¼ of section 15, township 15 N., range 13 E., in Nebraska Territory, by order of the Commissioner of the General Land Office, in his letter dated March 6th, 1858, before the register and receiver of the land office at Omaha city, N. T., May 10th, 1858.

This being the day appointed for hearing the testimony to be offered in the above case, the city of Omaha is represented by counsel

in the person of the city attorney, George T. Gilbert, and Attorney O. D. Richardson, and Robert Shields is represented by Attorney James M. Wollworth, M. S. Clinton, and James D. Test. The counsel for the city introduced Chauncey Wiltse as witness, who was duly sworn to testify.

By receiver:

Ques. Mr. Wiltse, are you the same person who testified on Saturday the 8th inst., in the case of the City of Omaha *vs.* John S. Edwards?

Ans. I am.

Ques. Will you please state all you know relative to the selection, reservation, and occupation and improvement of the tract in question for town purposes, viz: the W. ½ of the SW. ¼ sec. 10, and N. ½ of NW. ¼ sec. 15, town, 15 N., range 13 east?

553 Ans. The first time that I crossed this tract of land was in June, 1856. I remember of seeing a house which I now know to be located in the N. ½ of the NW. ¼ of sec. 15, on lot 7, in block 128½. This was previous to running the section lines in this township, (T.) 15 N., R. 13 E.) I then noticed this land staked off into lots, blocks, streets and alleys. I examined this land again in September, 1856, for the purpose of making this map, a copy of the old one and correcting the mistakes. I then noticed the same that I have noticed. I was over this tract again making an examination of the improvements on the 16th day of April, 1858. I then saw the same improvements as before, and another house, which is located on lot 9, in block 141 ½. I made this inspection for the city of Omaha, at their request. I have been on the tract so as to see all over it again this morning, and noticed the same improvements as before, with the exception that some of the stakes were not standing. I have always heard this called city property; there have no sales come under my observation. This was included within the incorporated part of the city and in the original plat of the town, as filed in this office, and was incorporated by an act of legislature of the Territory approved Feb'y 2d, 1857.

By attorney:

Ques. Was the whole of this land pre-empted by Mr. Shields, platted and staked out in lots, blocks, streets and alleys; if so, when?

554 Ans. It was. I could not say when, as it was done before I came here, June, 1856.

Ques. Please describe the house standing in block 141½, spoken of in your testimony.

Ans. It is a small wood house, 12 x 16 ft. square, with one door, 2 or 3 windows, 2 certain, one story high, shingle roof. I did not see the floor. There was no one living in it this morning. There was furniture in the house and had been occupied.

Ques. Do you know when and by whom this house was erected?

Ans. I do not.

By city att'y:

Ques. Do you know whether the fences around the lot on block 128½ corresponded with the lines of the city as platted by you?

Ans. It does correspond with the lines of the street as laid down and platted. It is bounded on three sides by streets.

Ques. How many of the lots on that block does the fence include?

Ans. It includes 10 lots, viz: from lot 6 to 15 inclusive. Around the house, on block 141½, there is a post and rail fence; around the yard in front of the house, and this front yard, corresponds to
555 the lines to the streets. It commences at the corner of the house and extends to the line of the street, runs along the street 16 feet and back to the other corner of the house.

Ques. How long has the fence stood around the house on block 128½?

Ans. I could not say. I do not remember when it was put there. From the appearance of it I should judge it had been there a year at least.

Ques. Does the front of the house you have spoken of correspond with the streets and fence?

Ans. They do.

By d'f't att'y:

Ques. When you examined the improvements this morning, did you discover any other improvements, such as breaking?

Ans. I saw three or four furrows along the east side of this pre-emption, and the south side; and on the west there was, I should think, between 3 and 4 acres broken. It extended from the west boundary eastward, so as to be all included in this pre-emption; and right west of the lots in block 128½ there was some breaking in the street, about 50 feet wide and *220 feet long. This was in 18th street, as marked on the plat.

* Originally 132 feet, but altered at the request of the witness and consent of parties.

556 Ques. Will you please state whether any crop had been put in this breaking?

Ans. I could not say there was or had been.

Ques. State whether there is any barn on this tract in controversy.

Ans. There is a small shantee, or barn, extending into the street on the south side of lots in the block. It extends into Blessington street.

Ques. State, as near as you can, the size of the barn spoken of.

Ans. It is from 20 to 30 ft. square; I should think about 7 ft. high. I cannot say as to a roof; it had hay on top. The sides of it was constructed of boards set up and down.

By receiver:

Ques. You have spoken of ploughing in the streets and building in the streets. Is it a street used for a street, or simply staked out as such?

Ans. It was merely staked out as a street, and platted as such.

By d'f't att'y:

Ques. Are they any roads running across this tract of land?

Ans. There is a road running across the N. east corner of
557 the N. ½ of the NW. ¼ sec. 15. It runs diagonally across the corner from N. west to S. east across this tract.

Ques. Are any of the streets worked and used as such?

Ans. All the improvements I know of is a bridge that runs across 16th street, which is across the creek, and 16th street is on the eastern boundary of this tract.

Ques. Do you know when and by whom this bridge was built?

Ans. I don't know. It was some time last summer.

Ques. Are the streets on this tract of land used as such?

Ans. They are not?

By pl'ff att'y:

Ques. Is not the bridge across 16th street a bridge that is very much used for travelling over?

Ans. It is.

Ques. After leaving that street, what course does the travelled road take?

Ans. It takes a northerly course, and follows 16th street, I should think, 20 or 30 rods, and then runs a northeasterly direc-
558 tion, and then runs a northwesterly direction across this tract.

Ques. When was this ploughing done, judging from appearance of it?

Ans. I know it has all been done since the 16th of April last, (1858.)

Ques. Do you know who did it?

Ans. I do not.

By d'f't att'y:

Ques. Do you wish to be understood there was no ploughing done on the tract previous to the 16th of April last?

Ans. The fence that encloses the 10 lots that I have spoken of—inside of this fence it is all broken and been ploughed. I don't know how long, except that portion that is occupied by the house in block 128½. The breaking that I mention has all been done since the 16th of April, 1858, outside of block 128½.

By d'f't att'y:

Ques. State whethe these 10 lots are fenced in, include the alleys and streets, or any part of them.

Ans. It embraces the alleys, and no part of the streets.

Ques. What quantity of land is included within the fence
559 enclosing the 10 lots spoken of?

Ans. 220 ft. by 280 ft., including the alleys, and is about 1 acre and 41 hundredths.

CHAUNCEY WILTSE.

Lorin Miller was called and duly sworn to testify :

Ques. Are you a surveyor or civil engineer by profession?

Ans. I am.

Ques. How long have you resided in the city Omaha?

Ans. Since October, 1854.

Ques. Are you acquainted with the tract of land pre-emted by Robert Shields?

Ans. I am.

Ques. Did you ever survey this tract and lay it out into lots, blocks, streets, and alleys?

Ans. I did; the entire portion of it.

Ques. At what time did you do this work?

560 Ans. It was in the spring of 1855, and we staked a portion of it in 1856, the stakes having been pulled up by the Indians.

Ques. For whom did you make this survey?

Ans. For the Omaha City Company.

Ques. At the time you made this survey did you observe any improvements of any kind or character on this tract?

Ans. There was a house near the N. east corner of the tract; but I am not sure that it was on the tract.

Ques. Have you done any further work for the Omaha City Co., or the corporation of the city, on this tract?

Ans. Nothing but the restaking spoken of above.

Ques. Do you know of any improvements having been made on this tract since it was surveyed by you?

Ans. The house on block 128½ was built since the first survey by me of this tract; but it was building at the time I restaked. It was built by Robert Shields.

Ques. Was that a building that was erected on lots bounded

561 as by your first survey?

Ans. It commenced with lot 10, and I believe was the S. ½ of block 128½; but I cannot remember how many lots there was. I should think he commenced the building in the fall of 1855, but was built mainly in the spring of 1856.

Ques. You sepeak of a second house. What part of the tract was that house on?

Ans. It was on block 141½.

Ques. Who built that house?

Ans. I do not know.

Ques. For whom was it built?

Ans. I do not know.

Ques. Has it ever been occupied?

Ans. I believe it has. I have passed there and seen people in it; but don't know who occupied it, or who owned it.

Ques. Do you know of any persons ever having resided in the house you speak of as built by Robert Shields?

Ans. I don't know. Mr. Shields told me he lived there.

Ques. Do you know of any other improvements having been

562 made of any kind or character except those before spoken of by you?

Ans. None other, except the fencing of the square, and the breaking of a garden, done by Mr. Shields.

Ques. Have you had any conversation with Mr. Shields with regard to his having purchased the lots in block 128½, being in the southern part of that block, where the house now stands?

(The counsel for defense objected to the above question being answered for the reason that the sales, if any, should be proved by a higher grade of testimony.)

The receiver decided the question might be answered.

Ans. I have had 3 different conversations with him in regard to ownership of the south half of that block.

Ques. What was said by him at the first conversation?

Ans. The first conversation I had was held about the time I restaked the tract, in June, 1856, and he said he owned the lots. He said he had purchased them, and had paid, he said, a pretty good price for them. Soon after he stated to me, in another conversation, he had sold the lots. I understood him to say he had sold
563 them to Squire Hallock; and in a third conversation, that he had purchased them back again.

By receiver:

Ques. Do you know of anything in regard to the sale and transfer and retransference of the property, as spoken of by Mr. Shields, except by such conversations him and common report?

Ans. Nothing, except Mr. Hallock told me he had purchased of him.

Ques. When did this 3d conversation occur between yourself and Mr. Shields?

Ans. I cannot say the exact time; but it was at the time I signed a paper for him to present to the council, to allow him to pre-empt. But some time in the summer of 1857, it was, he told me had purchased them back again.

LORIN MILLER.

Recalled.

Ques. Who presented that petition to you for your signature?

(Counsel for defence objected to the above question.)

The witness was at this point put upon his voir dire.

By receiver:

Ques. Have you an interest either directly or indirectly in the land in controversy?

Ans. I purchased of Mr. Bovey 3 lots in blocks 143½ and 144½, 2 in the first-named block, and 1 in the last named, with money
564 belonging to O. J. Ruger, Washington city. I had previously a contract with him. All the lands I purchased with money furnished by him. I was to have an interest of one-third of the avails. The deeds are made out in the name of Mr. Ruger, and the property still remains as it was purchased by me for Mr. Ruger. I have no other interest in this except as stated above.

LORIN MILLER.

The register and receiver decided at this point that Mr. Miller was not a competent witness to prove any agreement between himself or Mr. Shields, he being a direct party in interest.

The plaintiffs offer to prove by the witness, Mr. Miller, that Robert Shields, before he pre-emted, offered to the witness that if he would sign the petition praying Omaha city council to allow him to pre-empt the tract in dispute, he would deed to witness the lots purchased by witness in the name of and for Ruger, and that witness, accordingly, signed the petition.

(Overruled.)

Wm. R. Demarest was called and duly sworn to testify.

Counsel for defense had Mr. Demarest sworn upon his vori due.

565 By receiver:

Ques. Is your interest to be affected either directly or indirectly by the termination of this suit?

Ans. It is not.

By d'f't att'y:

Ques. Have you ever had any interest in this land in controversy?

Ans. I have had.

Ques. Have you ever disposed of that interest?

Ans. I have.

Ques. In what way did you dispose of it?

Ans. For money; the same way I sell anything else.

Ques. Did you convey the same by deed? If so, to whom?

Ans. I did; to Mr. Thos. Cox, jr., New York city, my wife's brother.

Ques. How much did you receive for that interest?

Ans. Five hundred dollars for 4 lots.

Ques. Have you ever agreed with your brother-in-law to get him a good deed for them if you could?

Ans. I had no agreement with him.

Ques. Did this man Cox ever pay you for them, and did he

566 pay you cash?

Ans. He paid me the amount in a draft on New York.

Ques. Did you ever agree to restore him the money in case you could not get a good deed for the lots?

Ans. I did not. There was no agreement with him; and he don't know anything about the title to the lots.

Ques. Did you represent to him that the titles were good?

Ans. I did not.

Ques. Did you execute a warrantee deed?

Ans. I did not. It was a quit-claim deed.

Ques. Did you ever purchase an interest in this land; and if so, when, and from whom?

Ans. I purchased these four lots refered to from Mr. Sweezey—that is, his interest in them—last fall, some time in November or December; the records will show the date. Mr. Sweezey and myself had previously bought the 4 lots from Mr. Southwick about July, 1856.

Ques. Did Mr. Cox send you that money to be invested in
567 real estate?

Ans. He did.

Ques. At what time did he send it?

Ans. I think it was last August, (1857.)

Ques. Did he make an agent of you to invest the money for him?

Ans. He sent me the d'ft, and with it a letter, stating that I could invest the amount for him in real estate, and if I had any lots of my own that I could sell cheap to dispose of it in that way; and this sale was made in accordance with that letter.

Ques. Did you ever send him that quit-claim deed?

Ans. I did.

WM. R. DEMAREST.

The receiver here decided that Mr. Demarest was a competent witness.

Wm. R. Demarest was sworn to testify in the case.

By city att'y:

Ques. Do you know when Mr. Shields pre-empted this land in contest?

568 Ans. I do not.

Ques. Before the 21st of November last, had you the agency in any lots in this tract?

Ans. I had not.

Ans. He had.

Ques. Did Mr. Cox own any lots in the tract in dispute prior to the 21st of November last?

(The above question objected to. The objection overruled by the court.)

Ans. to the ques. He did.

Ques. What particular lots were they he owned?

(Question above objected to.)

Ans. I cannot say exactly.

Ques. Was there any agreement on the part of Mr. Shields to convey these lots before the pre-emption?

569 (Counsel for defense objected to the above question. Objection was overruled.)

Ans. to the ques. There was.

Ques. Was it a written or verbal contract?

Ans. It was a verbal contract.

Ques. You will please state what that contract was.

Ans. Mr. Shields told me in front of my store. I hailed him and stopped him. I told him I had sold lots in his claim, and had sold them to my brother-in-law. I said to him, Mr. Shields will you make me deeds for the lots so I can send them to him? I told him I heard he was going to pre-empt, and I wanted to know if he would make me deeds if he did pre-empt, so I could send them to my brother-in-law. He tapped me on the shoulder and requested me to be still; then he said it was not decided yet, but would be to-day, (that is the day the

conversation was held.) He said that he was on his way to the land office, and said he expected it would be decided that day. I said to him, In case it is decided in your favor will you make out the deeds? He said, certainly I will. He appeared to be in great haste, and went down Farnham street towards the land office. He told me he
570 would make out deeds to all persons residing in Omaha, but to all persons who lived east he would not deed to them.

(The counsel for the defense objected to the above question and answer.)

Ques. At that conversation that you had with Mr. Shields did you mention to him the particular lots that belonged to Mr. Cox?

(The above question was objected to.)

Ans. No, sir; he asked me where the lots lay. I told him I had a map, and would show them to him. But he said the trial was coming off right away, and he was in such a hurry he could not stop to see them.

Ques. Have you called on Mr. Shields since he pre-empted for a deed of these lots for Mr. Cox?

(The above objected to by defence.)

Ans. I have.

Ques. Did you get the deed?

Ans. He told me it was not fixed up yet and he was not ready to deed.

Ques. Have you called on him for a deed since he got it fixed up?

571 Ans. I have not; he called on me to give it to me.

(The counsel for defence objected to the above question and answer.)

Ques. What was the conversation between you then?

Ans. He came to my store in a buggy in company with another gentleman. He said he had heard what I had been doing; that I had taken certain affidavits, and opperating against him. I told him I was operating against wrong and right wherever I found it; I told him he had promised to give me a deed to send to my brother-in-law and he had not done it. He said he had come prepared to give me a deed. I told him that I was not prepared to take a deed from him untill he satisfied me that he had a better title to it than I had. That was the conversation as near as I can recollect. He got into the buggy and drove away.

WM. R. DEMAREST.

Mr. J. C. Hileman called and swore to testify in this case:

By city att'y:

Ques. Are you acquainted with the pre-emption of Mr. Shields so as to know where the lines run?

572 Ans. I think I do.

Ques. How long since Mr. Shields obtained an interest in the lots where the house stands by which he pre-empted?

(The counsel for defence objected to above.)

Ans. I think he obtained that interest in the fall of 1854 or spring of 1855.

Ques. Do you know what that interest was?

Ans. I believe it consisted of some 20 lots.

Ques. Did you have any business relations with him anywhere near that time or after?

(The above question objected to.)

Ans. I had after.

Ques. What were those relations?

Ans. I was in partnership with him in the mercantile business.

(Counsel for defence objected to the above question and answer.)

Ques. Did he tell you at any time how many lots he had in
573 this land since pre-empted by him?

(The above objected to.)

Ans. I believe he claimed two 20 lots scripts that were issued to him by the company, the Omaha City Co.

Ques. What conversation did you have with Mr. Shields in regard to these 2 certificates of 20 lots each that were issued to him?

Ans. I don't remember any particular or distinct conversation in regard to them. He got 20 lots and he claimed 20 more. That is all I know about it.

Ques. Do you know whether this house in which Mr. Shields lived when proved up stands upon some of the lots that were there purchased by the company?

(Counsel for defence objected to above.)

Ans. The house which he built shortly after he obtained those lots was built upon them and stands there yet.

Ques. Where did Mr. Shields live when he proved up?

Ans. I do not know.

Ques. Do you know on what block that house stands?
574 Ans. I do not.

Ques. What time did he begin to build that house?

Ans. It was in the spring after he came here; I think the spring of 1856.

Ques. What became of the house?

Ans. He sold it to Mr. Beeson.

(Counsel for defence objected to above question and answer.)

Ques. How much did Mr. Beeson pay him for it?

Ans. Eleven hundred dollars, I believe.

Ques. How long did Mr. Beeson occupy the premises?

Ans. Until the fall of 1857 he was there with his family.

Ques. What became of the premises then?

Ans. Mr. Beeson sold the premises to Mr. Shields.

(Counsel for defence objected to above question and answer.)

Ques. Do you know the price paid, and the number of lots?
575 Ans. I do not.

Ques. Do you know of Mr. Shields having sold any other lots, as designated on the plats, to any other person?

Ans. I do not.

(Counsel for defence objected to above question and answer.)

Ques. Do you know how long Mr. Shields lived on those premises, in the house, previous to his selling to Mr. Beeson?

Ans. He did not live there at all previous to his selling to Beeson. He first went to live there last fall. When he first went there his family was east, but after he got on the place his family came back from the east; they lived there.

By receiver:

Ques. Where did Mr. Shields reside in the summer of 1857?

Ans. I believe a portion of the time on the Elkhorn river. His family was not there with him; they were not in the Territory.

Ques. Did Mr. Shields make a claim on the Elkhorn in the summer of 1857?

Ans. He bought one of Joseph Stokes.

Ques. Did he improve that claim by planting crops or building upon it?

576

Ans. He had some breaking done and a well dug; I don't know of his raising any crops on the ground.

Ques. Does Mr. Shields now reside upon the tract he bought of Joseph Stokes?

Ans. He does.

By d'f't att'y:

Ques. Do you know whether he owns the land he lives on or not?

Ans. I don't know whether he owns it or whether his wife owns it.

Ques. Are you willing to swear that either of them own it?

Ans. I am not.

Ques. Have you ever heard Mr. Shields say who did own it?

Ans. I don't know; I have heard Mr. Shields say so many things, I cannot tell.

JOHN C. HILEMAN.

Mr. J. C. Johnson was called and duly sworn, on his voir dire:

577 Ques. Will you interest be affected, either directly or indirectly, in the result of this suit?

Ans. It will not.

Mr. Johnson was declared a competent witness, and duly sworn to testify.

By pl'ff att'y:

Ques. Mr. Johnson, where do you reside?

Ans. I live on block 111½, in the city of Omaha, and is some 15 or 20 rods north of the tract in question.

Ques. Have you ever had any conversation with Mr. Shields in regard to pre-empting; if so, when was it, and what was said on that occasion?

(The above question was objected to by counsel for defence, and overruled.)

Ans. I heard him say, previous to his proving up, that he intended to prove up, but did not hear him say anything about conveying it.

Ques. Did you hear him say anything about his pre-emption on the Elkhorn?

Ans. I heard him say he had hired a man to prove up for him on the Elkhorn.

578 (The counsel for defence objected to the above question and answer.)

Ques. State all you know in regard to Mr. Shields residing on the claim or tract in dispute.

Ans. He commenced to build a house, or rather an addition to the house, about the 1st of September, 1857. He lived there without his family until about the 10th of November, 1857; then his family moved in.

Ques. Did Mr. Shields' family reside or sleep in the addition that was put up?

Ans. I cannot say, as I never saw a bed in it. He done his cooking in the addition he put up.

Ques. Did you ever see beds in the old house?

Ans. I did not.

Ques. How large was this addition?

Ans. I should think 12 x 16 feet square, and was attached to the old house.

Ques. Is there any communication between the old house and addition?

Ans. There is.

579 Ques. Is there any chimney?

Ans. I think not; there is a stove-pipe.

Ques. Was there any floor to the addition?

Ans. There was.

Ques. Who did Mr. Shields obtain the big house from?

Ans. John Beeson resided there.

Ques. Do you know how long Mr. Beeson resided there?

Ans. From July, 1856, to some time in August, 1857.

Ques. While Mr. Beeson was there, was there any other building on this tract pre-empted by Mr. Shields?

Ans. There was a dwelling house on it.

Ques. What block was that on?

Ans. I could not say, but think it was 140 or 141.

Ques. Who put up that house?

Ans. Mr. Sweeney.

580 Ques. How many lots had Mr. Sweeney there?

Ans. I don't know.

Ques. Do you know what arrangement existed between Mr. Sweeny and Mr. Shields?

Ans. I heard Mr. Shields say that he gave Mr. Sweeny six hundred dollars to withdraw.

Ques. What became of the house and lot by that arrangement?

Ans. I heard Mr. Shields say he owned that house. This was since he pre-empted.

Ques. What time did Mr. Sweeney leave that house?

Ans. I cannot say, positively, but think it was in July or August; it was before the pre-emption.

Ques. Was there any building on block 127½?
Ans. There was, but there is none there now.
Ques. When did you first see that house on block 127½?
Ans. On or about the 10th of August, 1856.
581 Ques. When was the last time you saw it there?
Ans. It was there after the pre-emption.
Ques. How large was that house?
Ans. It was 12 or 14 x 16 ft.; had a shingle roof, floor, window, and door.
Ques. Had any one lived in it to your knowledge?
Ans. There had.
Ques. Did Mr. Shields make any other improvements except putting up the addition to the house?
Ans. I think he set out some trees north of the house and within the inclosure.
Ques. When did he do that?
Ans. Last fall, along in November, I think.
Ques. Do you know of any breaking being done on this pre-emption of Mr. Shields this spring?
Ans. I do; but cannot say who caused it to be done. It was done by a young man that works for Mr. Smith.

582 By receiver:

Ques. Do you know, of your own knowledge, of any agreement between Mr. Shields and Mr. Sweeney, whereby Mr. Sweeney was to withdraw from the contest?
Ans. I don't know anything of my own knowledge, except what Mr. Shields said.

By att'y:
Ques. Were you often in this house when Mr. Shields was living on this tract?
Ans. I was.

By def't att'y:
Ques. How long did Mr. Shields live in the house after his family moved in?
Ans. I think until last March, (1858.)

J. C. JOHNSON.

Adjourned to Tuesday, May 11th, 1858, at 9 o'clock a. m.

MAY 11TH, 1858, 10 o'clock a. m.

Mr. Wm. N. Byers was called and duly sworn to testify in this case.

By city att'y:
Ques. Are you the same person that testified on Saturday last, the 8th inst., in the case of The City *vs.* John S. Edwards?
Ans. I am.
583 Ques. You will please state all you know relative to the selection, reservation, occupation, and improvement of the tract in question, for town purposes, viz: the W. ½ of the SW. ¼ sec. 10, and the N. ½ of the NW. ¼ of sec. 15, town. 15 N., range 13 east.

Ans. This tract of land comprises a portion of each of the claims formerly known as the Clancey or Sulphur Spring claim, the Weir claim, and the Ed. Jeffries claim. These several claims were purchased on or about month of December, 1854, by members of the Omaha City Company. I was imployed by J. M. Palmer, the president of said company, to survey the exterior lines of these claims, and did survey them; the Jeffries and Weir claim on the 25th December, 1854, and the Clancey claim on the 26th of December, 1854, under the personal direction of M. Palmer. The lines of said claims were irregular, running across this tract in a southwest and northeast course. We marked them by setting stakes every 5 chains. In the spring of 1855 Col. Miller was employed to survey this land into lots and blocks for that company. He began the survey in this vicinity, I think, about the 1st of April. I frequently seen him at work on the ground with his men, and know that he surveyed and staked the whole of it into lots. Survey was drawen by Lyman Richardson, under the direction of Mr. Miller. After it was drawn it was placed in my hands to make certain changes and corrections before it was lithographed. The map now before me, marked "A," was
584 drawn under my own supervision. It is an exact copy of the original so far as lots, blocks, streets, and alleys are represented, and has only these 2 changes. The scale is reduced, and the one-half is added after the number of the blocks, before being lithographed and published. In the original map the blocks were designated by whole numbers in the published copy, and the half added after, to distinguish the blocks from those in the plate originally laid out by the Council Bluffs & Nebraska Terr'y Co. This property has, since its survey, been recognized, taxed, sold, transferred, and conveyed as town or city lots.

Ques. You have said that this map, marked A, is an exact copy of the original map. I would ask if this was proved by an actual survey of the premises?

Ans. It was proved by examination on the ground, sufficient to satisfy myself that the original map was correct, and corresponded with the survey, and I followed the copy or original map.

Ques. Are you a resident of the city of Omaha?

Ans. I am.

Ques. When did you become such?

Ans. In the fall of 1854, and have continued to reside here ever since.

585 Ques. Are you a surveyor by profession?

Ans. I am.

Ques. Did you, a deputy U. States surveyor, survey this land for the U. States, and lay it out into sections?

Ans. I did, in June, 1856.

Ques. At the time you surveyed it, a U. States deputy surveyor, did you find the stakes that Col. Miller set in his survey into lots, blocks, streets and alleys of this tract?

Ans. I did find many of them.

Ques. Was that fact made apparent in your field notes?

Ans. It was noted in my field notes and designated on my plat.

Ques. Have you any knowledge of any improvements of any kind or character having been made on the tract in dispute, or any portion of it by the Omaha City Co., the corporate authorities of the city of Omaha, or individuals other than that to which you have above alluded to?

Ans. I have not, as far as the city or the Omaha City Co. are concerned. There is a house on lot 7, in block 128½, about 16 x 24 feet, with a shed addition in the rear, familiarly known as the
586 Shields House. I think it was built in the spring or summer of 1856. There is an inclosure about the house, including lots No. 6 to 15, inclusive, which has been cultivated and partially planted with trees. The fence corresponds with the street on the east, south and west, and with the line of the lots on the north, and includes the alley dividing the south half of the block through the centre, from south to north. There is a small piece of plowing west of this inclosure, about fifty feet wide, and something over 200 ft. in length. It has the appearance of having been recently done. There is a stable or shed on the south side of this inclosure, I should think about 15 ft. in width, and between 20 and 30 feet long. One end of it, or perhaps one-half of is inclosed with boards and covered with hay. There is a house on lot 9, in block 141½, about 12 x 16 feet square, and one story high, with a small enclosure or yard in front. The fence is of posts, and, I think, one or two rails or boards nailed on. There is a strip of breaking across the west end of the north ½ of the NW. ¼, sec. 15, I should think, perhaps, from 5 to 7 acres. It has the appearance of having been recently ploughed. I know of no other improvements.

Ques. Does all the ploughing you have spoken of appear to have been done this spring, or do you know it to have been done this spring?

Ans. It has the appearance of having been done this spring, except the S. ½ of block 128½, the enclosure about the house
587 first spoken of, which I should think had been plowed 2 years.

By att'y:

Ques. Is this land pre-empted by Mr. Shields within the corporate limits of the city of Omaha?

Ans. It is.

Ques. Do you know of any other houses except those you have mentioned as having been erected on this tract?

Ans. I do not.

Ques. Please state the number of inhabitants in the city of Omaha, boath at the time Mr. Shields' entry and at the present time, to the best of your judgment.

Ans. I should think it is in the neighborhood of three thousand.

Ques. Do you know where Mr. Shields resided, and what his occupation was at the time the house on block 128½ was being built?

Ans. He was selling good in Omaha; resided in a house on lot 4, in block 134, in Omaha.

Ques. Where has he since resided?

Ans. I do not know.

588 Ques. Who occupied the house on block 128½ during the summer and fall of 1857?

Ans. I do not know.

Ques. Were you on the tract in dispute in the month of April last?

Ans. I was not.

Ques. When was you last on this tract?

Ans. Yesterday, May 10th, 1858.

By d'f'ts att'y:

Ques. Do you wish to be understood that the whole of the house on block 128½, known as the Shields House, was built in the summer of 1856?

Ans. I do not. There is a small shed addition, which has the appearance of having been built since, I could not say when.

Ques. You will state who were the proprietors of the old town of Omaha.

Ans. The Council Bluffs and Nebraska Terr'y Com'any.

Ques. You will please state if the lands of the Omaha City Company were not additions to the old plat.

Ans. They are.

589 Ques. You will please state the distance from the south line of the land in controversy to the north line of the entry made by the mayor of the city of Omaha.

Ans. It is three-quarters of a mile.

Ques. Will you state the number of the inhabitants in the mayor's entry, according to your best judgement?

Ans. I should guess between a thousand and twelve hundred.

Ques. What proportion of the town improvements are included within the tract entered by the mayor?

Ans. I should say three-fifths of the value of the improvements.

Ques. What is the number of the inhabitants living in the tract entered by John Davis, according to your best judgment?

Ans. Five hundred and fifty.

Ques. What is the number of inhabitants living in the tract entered by Thomas Davis, according to your best judgment?

Ans. I should think one hundred and twenty-five.

Ques. What is the number of inhabitants, according to your best judgment, living on the tract entered by C. W. Rodgers?

590 Ans. I should think fifty.

Ques. What is the number of inhabitants living on the tract entered by Stephen Herzog, according to your best judgment?

Ans. Three hundred to three hundred and fifty.

Ques. What is the number of inhabitants living on the tract entered by Christian Kreebs, according to your best judgment?

Ans. I should think from 40 to 50.

Ques. How many inhabitants are living on the tract entered by Pierre Bayard?

Ans. I should think 200.

Ans. It was noted in my field notes and designated on my plat.

Ques. Have you any knowledge of any improvements of any kind or character having been made on the tract in dispute, or any portion of it by the Omaha City Co., the corporate authorities of the city of Omaha, or individuals other than that to which you have above alluded to?

Ans. I have not, as far as the city or the Omaha City Co. are concerned. There is a house on lot 7, in block 128½, about 16 x 24 feet,
586 with a shed addition in the rear, familiarly known as the Shields House. I think it was built in the spring or summer of 1856. There is an inclosure about the house, including lots No. 6 to 15, inclusive, which has been cultivated and partially planted with trees. The fence corresponds with the street on the east, south and west, and with the line of the lots on the north, and includes the alley dividing the south half of the block through the centre, from south to north. There is a small piece of plowing west of this inclosure, about fifty feet wide, and something over 200 ft. in length. It has the appearance of having been recently done. There is a stable or shed on the south side of this inclosure, I should think about 15 ft. in width, and between 20 and 30 feet long. One end of it, or perhaps one-half of is inclosed with boards and covered with hay. There is a house on lot 9, in block 141½, about 12 x 16 feet square, and one story high, with a small enclosure or yard in front. The fence is of posts, and, I think, one or two rails or boards nailed on. There is a strip of breaking across the west end of the north ½ of the NW. ¼, sec. 15, I should think, perhaps, from 5 to 7 acres. It has the appearance of having been recently ploughed. I know of no other improvements.

Ques. Does all the ploughing you have spoken of appear to have been done this spring, or do you know it to have been done this spring?

Ans. It has the appearance of having been done this spring,
587 except the S. ½ of block 128½, the enclosure about the house first spoken of, which I should think had been plowed 2 years.

By att'y:

Ques. Is this land pre-empted by Mr. Shields within the corporate limits of the city of Omaha?

Ans. It is.

Ques. Do you know of any other houses except those you have mentioned as having been erected on this tract?

Ans. I do not.

Ques. Please state the number of inhabitants in the city of Omaha, boath at the time Mr. Shields' entry and at the present time, to the best of your judgment.

Ans. I should think it is in the neighborhood of three thousand.

Ques. Do you know where Mr. Shields resided, and what his occupation was at the time the house on block 128½ was being built?

Ans. He was selling good in Omaha; resided in a house on lot 4, in block 134, in Omaha.

Ques. Where has he since resided?

Ans. I do not know.

588 Ques. Who occupied the house on block 128½ during the summer and fall of 1857?

Ans. I do not know.

Ques. Were you on the tract in dispute in the month of April last?

Ans. I was not.

Ques. When was you last on this tract?

Ans. Yesterday, May 10th, 1858.

By d'f'ts att'y:

Ques. Do you wish to be understood that the whole of the house on block 128½ known as the Shields House, was built in the summer of 1856?

Ans. I do not. There is a small shed addition, which has the appearance of having been built since, I could not say when.

Ques. You will state who were the proprietors of the old town of Omaha.

Ans. The Council Bluffs and Nebraska Terr'y Com'any.

Ques. You will please state if the lands of the Omaha City Company were not additions to the old plat.

Ans. They are.

589 Ques. You will please state the distance from the south line of the land in controversy to the north line of the entry made by the mayor of the city of Omaha.

Ans. It is three-quarters of a mile.

Ques. Will you state the number of the inhabitants in the mayor's entry, according to your best judgement?

Ans. I should guess between a thousand and twelve hundred.

Ques. What proportion of the town improvements are included within the tract entered by the mayor?

Ans. I should say three-fifths of the value of the improvements.

Ques. What is the number of the inhabitants living in the tract entered by John Davis, according to your best judgment?

Ans. Five hundred and fifty.

Ques. What is the number of inhabitants living in the tract entered by Thomas Davis, according to your best judgment?

Ans. I should think one hundred and twenty-five.

Ques. What is the number of inhabitants, according to your best judgment, living on the tract entered by C. W. Rodgers?

590 Ans. I should think fifty.

Ques. What is the number of inhabitants living on the tract entered by Stephen Herzog, according to your best judgment?

Ans. Three hundred to three hundred and fifty.

Ques. What is the number of inhabitants living on the tract entered by Christian Kreebs, according to your best judgment?

Ans. I should think from 40 to 50.

Ques. How many inhabitants are living on the tract entered by Pierre Bayard?

Ans. I should think 200.

Ques. How many lives on the tract entered by John A. Harback?
Ans. I should guess 40.
Ques. How many live on the tract entered by John S. Edwards?
Ans. I know of none.
Ques. How many are living on the tract entered by James Vannestrand?
Ans. I know of none.
591 Ques. How many are living on the NE. $\frac{1}{4}$ of sec. 16?
Ans. Perhaps ten.
Ques. How many live on the Preston Reeves entry?
Ans. Perhaps ten.
Ques. How many live on James Digby's entry?
Ans. I know of none.
Ques. How many live on Robert Shields' entry?
Ans. I think not more than 5 or 6.
Ques. How many families live on the Shields' tract?
Ans. I know of but one.
Ques. Will you state the distance from the ferry landing to the tract in dispute?
Ans. About $\frac{3}{4}$ of a mile.
Ques. Whose entries intervene between the ferry landing and the tract in dispute?
592 Ans. Christian Kreeb and John S. Edwards. A direct line cut across would also cut a corner of John A. Horbuck's preemption.
Ques. Will you state whether there is any travelled road direct from the ferry landing to the tract in dispute?
Ans. There is not.
Ques. Is the tract in dispute accessible from the ferry landing, in a direct course, with teams?
Ans. It is not. A slight departure from a direct course would make it accessible.
Ques. How do you know that Col. Miller was employed to survey these lands for the Omaha City Company?
Ans. At the time he was employed I was an applicant for the job of myself. There was pretty warm competition for several days, and some under-bidding. The contract eventually let to Col. Miller, who undertook to survey and stake the lots for about 13 or 14 cents per lot. I know these by conversations with Col. Miller, Gov. F. B. Cuming, J. M. Palmer, about the time the contract was let. A part of the payment was to be in town lots and grounds. I know that Col. Miller went on to do the work, from seeing him frequently at it.
Ques. State how much land there is included in the whole
593 town of Omaha, as incorporated.
Ans. I think in the incorporated limits there is about thirty-two hundred acres.
Ques. Are you acquainted with the town as platted, up and down the Missouri river, in the vicinity of Omaha, and adjacent to each other? If so, please state how many miles of town, up and down said river, there is on the Nebraska side.

Ans. Saratoga joins Omaha on the north. It has about ¾ mile front on the river. It is rather less than that. Grand View joins it on the south. It has one mile front on the river. There has been an addition laid out south of it, having about one mile front on the river. These are all I know of contiguous to Omaha. Omaha has 3 miles front on the river.

Ques. How far is it from the north line of Saratoga to the south line of Florence?

Ans. I think there is about a mile.

Ques. How far is it from the south line of Florence to the north line?

Ans. I think 1½ or 2 miles.

594 By pl'ff's att'y:

Ques. In the estimate which you have made of the improvements in the incorporated towns, do you include the capitol building as being within the mayor's pre-emption of three hundred and twenty acres?

Ans. I do.

Ques. How would you estimate stand without including the capitol and court-house?

Ans. I think about one-half the value of the improvements are mayor's entry.

By d'f't's att'y:

Ques. Do the improvements of the several entries made within the incorporate limits correspond with the number of inhibitants, as you have given them?

Ans. Very nearly in extent, but not in quality or value.

(The receiver objected to the above, and it was not put.)

WM. N. BYERS.

Mr. George Hepburn was called, and duly sworn to testify.

By city att'y:

Ques. Where was you living when Mr. Shields pre-empted, viz: 21st of November, 1857?

595 Ans. The time Mr. Shields pre-empted, I was living with him. I don't recollect the date precisely.

Ques. What building did Mr. Shields live in at that time?

Ans. He lived in a house on the place, to which he built an addition, and lived in the two.

Ques. How long did Mr. Shields live there before he pre-empted?

Ans. I don't recollect the time. He was living there when I went up to live with him.

Ques. How long was that before he pre-empted?

Ans. I went there some time in September, 1857.

Ques. What part of the building did Mr. Shields sleep in while you was there?

Ans. Mr. Shields and I slept together for a while, in the building first erected, and afterwards my brother and myself slept together, in the first house erected, and Mr. Shields slept once in the addition put up. More than that I cannot say. Mr. Shields usually got up in the morning before I did, and one morning I got up and found him in the addition put up. It was cold weather, and he had a fire in there.

Ques. What night was it he slept there? Was it before or after he pre-emption?

596 Ans. It was before the pre-emption.

Ques. Had he a bed in the new part before that time?

Ans. There was a bed, which my brother and myself occupied, in the old part; there was a loung bed that let down in the new part. The lounge was part of the time in the old part, and part of the time in the new.

By receiver:

Ques. Had he any furniture beside the lounge in the addition?

Ans. He had chairs, table, cooking utensils, &c. His family was on a visit to Pennsylvania, and were not here when the pre-emption was made, and I think were on the road back when he pre-empted, as they returned soon after he made the entry.

Ques. Do you know whether the family ever resided in that house previous to the pre-emption?

Ans. I don't know.

Ques. Where was the greater part of Mr. Shields' furniture at the time of the pre-emption?

Ans. I don't know how much furniture he had, but the furniture that was in the house was, the greater part of it, in the new house. He had other furniture, which was boxed up and stored in some of the warehouses. He got out his furniture a day or two after he pre-empted, and furnished the whole house, preparing for his wife's return.

597 By receiver:

Ques. Can you state precisely the size of the addition put up in 1857 by Mr. Shields?

Ans. I should think it is 12 x 14, 16 ft. It had a floor, an outside door, two windows, a roof; it was lathed and plastered inside, but was sealed up with canvass. The house was clapboarded.

By city att'y:

Ques. Is this addition put up by Mr. Shields a suitable building for a kitchen?

Ans. In this country I should consider it a very good building to occupy either for a kitchen or house.

Ques. What did Mr. Shields sleep on in the new part?

Ans. He slept on the lounge bed.

Ques. Where did Mr. Shields' family go to live when they arrived here?

Ans. They went to the Shields house, on the tract in dispute, I think the next day after they arrived.

Ques. How did they occupy the houses?

Ans. They were occupied much in the same manner as they were before.

Ques. How did they occupy the new part or addition, after
598 the family arrived?

Ans. It was occupied jointly with the other house, as before mentioned.

Ques. Was it not occupied as a kitchen?

Ans. The cooking was all done in the room, and the kitchen furniture was kept in that room. It was part of the time used as a dining room. There was no bed in there after the family came.

Cross-examined.

By d'f't att'y:

Ques. State what kind of a building it was.

Ans. It was a frame building.

Ques. State whether, at the time of the pre-emption, all the buildings on that tract in dispute, together with the improvements, did not belong to Robert Shields.

Ans. I could not state whether they all belonged to him or not. The house he lived in belonged to him, and the house that was fenced. There was another house, an open-built house, on the place. I don't know who it belonged to.

Ques. Was it not a matter of public notoriety that Shields was about to prove upon this tract, for a considerable time prior to his doing so?

599 Ans. So far as my acquaintance is concerned, I heard it spoken of frequently, and should think it was. I saw the notice published in the newspaper.

By pl'f's atty:

Ques. Was it not a matter of public notoriety that Mr. Shields was to deed the lots to the owners after he had pre-empted?

Ans. I should it was not. I heard a good many talking to Mr. Shields, at his house and various places, as to whether he would deed; and if it had been a matter of public notoriety, they would have known it.

Ques. Was this before or after the pre-emption?

Ans. It was both before and after.

G. W. HEPBURN.

Mr. Geo. Mills was called as a witness by the counsel for the plaintiff, and duly sworn to testify.

By att'y for pl'f :.

Ques. State whether you ever had any conversation with the defendant, Mr. Shields, before the pre-emption, upon the s'bject of his pre-empting this land.

Ans. I had.

Ques. State what that conversation was, and what action you took in the matter, predicated upon that conversation.

600 Ans. Some time in September, 1857, I had a conversation with Mr. Shields, in which he desired to pre-empt the land in question. To do so, he wished the citizens of Omaha to not to object to it, and desired me to cast about among the citizens, learn of them if they were willing he should pre-empt. I done so, and informed him at a subsequent time that some of them were and others were not. He presented to me a petition, the purport of which was to the city council or city authorities, or the citizens, I don't recollect which, to allow him to pre-empt the land in question. He desired me to circulate this petition. Previous to doing so I said to him that I had some lots in that pre-emption or vicinity which I had bought and sold to men that expected to get title when it should be pre-empted from the government. Now, said I, should you pre-empt, will you make deeds to the men that I have quit claim to or sold to? His reply was, That question I can't answer. In substance I replied, that will, then, end the matter. And we separated. Some two days afterwards Mr. Shields again called on me and introduced the same subject again, and desired me to circulate the petition, saying at the same time that no one in Omaha should complain of him after he had pre-empted for want of a deed. May I, said I, for you pledge myself that all lots belonging to people in Omaha shall be deeded by you after you have pre-empted? He replied, Make such pledges as you please; I shall not be responsible for them. To that I replied,

601 I want nothing more to say about it. We then discussed the subject at full length in regard to his making deeds should he pre-empt. At the close of the interview he said to me, Circulate the petition and I will make deeds to any man that you say is justly entitled to them. I then took the petition and circulated it. How many names I got upon it don't recollect. I handed the petition back to him, and said to him, I think the people of Omaha will allow you to pre-empt. Previous or subsequent to these conversations he had talked to me about the house built by him, then occupied, I think, by Beeson. He desired me to assist him in getting the house back from Beeson. I went with him in a buggy to see Mr. Beeson at the house on the premises; found him not at home. His wife informed us that he was down town. We found him shingling a roof of a house. I set in the buggy and Mr. Shields went on to the roof, there closed a bargain with Beeson for the house and lots; that is, the Shields house and the lots upon the land in question.

Ques. State whether you ever had any conversation with Mr. Shields after the pre-emption with regard to making deeds to these lot holders.

Ans. I did.

By receiver :

Ques. After the conversation held with Mr. Beeson wherein you say he closed a bargain for the house and lots, was
602 there any further conversation bearing directly on the matter ?

Ans. There was, but not at that time. Some day or two after I saw Mr. Shields, and he informed me that he had got the house and lot all right, and was now prepared to prove up. He said something about building a house or an addition before he should prove up, and then again introduced the subject, and wanted to know how many lots I wanted up there. I replied I wanted five, but said I did not know whether or not they were all in his pre-emption. I told him I thought a lot I had deeded to Misener was near his house, but that the deed was not recorded, and I did not know the description. In the course of the conversation he said he would give me deeds of lots after he had pre-empted this side; that is, south of his house, enough to cover all I had previously deeded, referring to the five lots, saying they were better lots than the tract would average. He desired me to assist him in the pre-emption. I done so, and on the day he pre-empted was a witness for him in reference to the question of title to the house obtained from Beeson. After the testimony had closed at the land office the officers took time to decide the question. During the pendency of the question I had one or more interviews with him; in each interview the rights of citizens to lots in the pre-
emption was discussed, in which he assured me that what I
603 had said in his behalf should be carried out. The evening after the land office had decided the question in his favor and he had obtained his certificate, he enquired what my list of lots were. I said to him I had no list, neither did I know the list. They were lots I had deeded; and I asked him whether there was any haste. The reply was, I would like to close it up soon. I think the certificate from the land office was issued Thursday. On Sunday morning following I. with a buggy, went to Mr. Shields' house. While there I talked to him about his pre-emption and these lots, together with other lots belonging to citizens of Omaha; was satisfied from the interview that Mr. Shields would not carry out his original agreement. On the Monday following I examined the register's office of Douglas county; found a deed executed for the equal undivided half of the premises in question made to Mr. Test. On Tuesday following I again saw Mr. Shields and inquired about the deed, and also in regard to what had passed relative to deeds of lots. He said he was still ready to make deeds. Said I, you have deeded half of the property; how can you make deeds ? His reply was, I have a right from Test to carry out all my agreements. I replied I did not believe it; and some strong words to it passed.

Ques. State whether Mr. Shields, since the pre-emption, has sold the other half of his pre-emption.

Ans. I understood from him that he had sold it to Mr. Smith.

Ques. Do you know whether or not he has ever offered to make any deeds to lot owners on this tract?

Ans. I do not.

By R. & R.:

Ques. Can you state what was the nature of paper you signed and circulated for him to which you have referred?

Ans. My impressions were that it was a petition. It might have been to the city council or not. It was getting leave for him to pre-empt.

Ques. Did it contain anything like an agreement that he would deed lots to persons claiming the same?

Ans. I don't think it did.

Cross-examination.

By def't att'y:

Ques. Did Mr. Shields come to you as an attorney to assist him in pre-empting?

Ans. I did, but I refused to act as such.

Ques. Did you not assist him as an attorney or counsel to
604 procure this pre-emption?

Ans. I did not assist him as attorney, but I did advise him as to the course to be pursued with his pre-emption.

Ques. Did he follow your advice?

Ans. I don't think he did; he did not in the last, if he did in the first.

Qus. Are you an attorney and practice before the land office?

Ans. I have had several applications; refused all, I believe, save one.

Ques. Did you assist Mr. Shields in obtaining this pre-emption?

Ans. I did, so far as recommending a course to be pursued, believing he would carry out in good faith what he had said to me.

Ques. What State did you remove from to this Territory?

Ans. From Michigan.

Ques. Was you an attorney in Michigan when you left there?

Ans. I think in 1838 or 1839 I commenced the reading of law; in 1840 or '41, I think, I was admitted as an attorney-at-law.
605 My impressions are that I commenced immediately after that in merchandizing, selling of goods; continued in that I think 4 or 5 years. During that time I had been fortunate in trade, paid up all my debts in New York, and established myself in New York as a man of responsibility, at which time I commenced the practice of law; continued in practice for some time. My acquaintances in New York sent me a large amount of debts for collection. By the laws of Michigan when I left there, any one had a right to practice law for himself or as the agent or attorney for another.

Ques. Was there any other qualification besides being a man to qualify him to appear as an attorney in courts of record in Michigan when you left there?

Ans. I think there was not by the laws; but by the rules of court the attorneys had powers; the citizens had not.

Ques. Did it not require a person to be a man of good moral character?

Ans. My impressions are that by the laws of Michigan any one of good moral character had the right to practice law.

Ques. Was you entitled to appear in prosecution or defence of causes in a court of record when you left there?

Ans. That depended, I think, upon the ruling of the court.

G. M. MILLS.

606 George Armstrong was called and duly sworn to testify in the case:

Ques. Are you acquainted with the tract of land pre-empted by Robert Shields, embraced within the city of Omaha?

Ans. I know the Shields pre-emption only by the location of the house he claims.

Ques. Please state what you know in regard to the original conveyance of the lots included in this tract of land by the Omaha City Co.

Ans. These lands were embraced in what was called Scriptown, in which Shields' pre-emption was located; were subdivided into lots by the Omaha City Co., and certificates of lots were issued by said company and divided among the individual members of the company, and afterwards disposed of by them to others. At a meeting held by holders of certificates for the distribution of the lots, I was selected to arrange the distribution and prepare the ballots. After the distribution the Omaha City Company requested me to act as their agent in making conveyances to the claimants of lots, in accordance with the drawings, in which capacity I have acted up to the present time, and am still acting in. Among other deeds, I have made out one to Robert Shields, he being the holder of certificate No. 416, calling for 20 lots, embraced in blocks 46½, 22½, 58½, 128½, 59½, 189½.

607 Ques. Please designate the lots in block 128½, these deeded to Mr. Shields.

Ans. They are numbers 6, 7, 8, 9 and 10.

Ques. What time did you execute the conveyance to these lots in block 128½?

Ans. It was the 16th day of October, 1855.

(Counsel for plaintiff at this point offered paper marked "B," in connection with the witness' testimony, which paper is offered as an exhibit in the case.)

(The counsel for the defence objected to the introduction of the said paper marked "B," for the reason that the same does not show that the original deed was acknowledged before a person authorized by statute to take acknowledgements, and the record thereof is therefore a nullity.)

Ques. Have you had the agency of any lots embraced in this tract?

Ans. I have been acting as agent for some friends in Ohio; have paid their taxes from year to year on these lots, to the marshall of

the city, and to the sheriff of the county, Mr. Reeves. I have paid all taxes.

Ques. How many of those lots, obtained from the Omaha City Co. for your friends in Ohio, have you thus paid taxes on?

Ans. I think about 170 lots. I have paid all taxes exacted
608 for the last two or three years on these lots.

Ques. Has Mr. Shields ever talked with you in regard to his making deeds of lots embraced in his pre-emption? If so, state when and what that the conversation was.

Ans. He has. Last fall, on my return from the east, understanding Mr. Shields has made a pre-emption in Scriptown, and finding that some of my friends, for whom I was acting as agent, owned lots in said pre-emption, I desired to know of Mr. Shields if he would convey these lots to them. He said he would. This was after he had pre-empted. I desired to know how much per lot he would charge. He gave me to understand, as I was a particular friend of his, that he would make conveyance for five dollars per lot. He said he could not afford to do it for any less, as he had been to a great deal of expense. At a subsequent conversation, when I informed him that I understood he had conveyed the undivided half of his pre-emption to another partie, he said that it would make no difference. I could still obtain deeds. This is all I remember of having said to him on the subject.

Cross-examination.

By d'f't att'y.:

Ques. How many of the 170 lots you have paid taxes on are in this tract?

Ans. 35 lots, I think, is all there is on this pre-emption of Mr. Shields.

609 Ques. Are any persons living on any of them?

Ans. I think not.

Ques. Will you state whether or not the object of the Omaha City Co., in laying these lands out into lots and blocks, and issuing certificates, was for the express purpose, by the distribution of them, of influencing the action of the legislature upon questions then pending before it?

Ans. I think it was not. I think it was for the purposes of a company speculation.

By pl'ff's att'y:

Ques. What proportion of these respective lots have been deeded to the owners of the same by the Omaha City Company?

Ans. I cannot answer that question without examining the records. I think over half of them.

Ques. Have all the lots of the land owned by the Omaha City Company been distributed according to their regulations and rules among the members of the company or the holders of the certificates?

Ans. They were all so distributed in the month of September, 1855.

By R. and R.:

Ques. Do you know of any one to whom these deeds were issued to have made any improvements of any kind or character
610 upon the lots so deeded to them?

Ans. Houses have been erected and occupied on some of those lots. I don't know whether any houses have been built on this pre-emption of Robert Shields.

Ques. Do you know the house built by Robert Shields in 1856 is on the land he pre-empted?

Ans. I don't know it.

By d'f't att'y:

Ques. Do you know whether or not any of the 20 lots deeded by the Omaha City Company to Shields are within his pre-emption?

Ans. I could not tell without making an examination. On examining the plat I find there is 10 of those lots on his pre-emption.

Ques. Do you know of your own knowledge whether the tract pointed out to you by plaintiff's counsel is Shields' pre-emption?

Ans. I don't know of my own knowledge.

Ques. How much land was claimed and laid out into lots and blocks by the Omaha City Company?

611 Ans. I do not know.

Ques. How many lots were laid out by the Omaha City Co.?

Ans. Several thousand; as much as 3 or 4 thousand. I don't think there is over 5 thousand.

Ques. What proportion of certificates of lots have not been yet delivered up for deeds?

Ans. I cannot say without making an examination.

Ques. Were these certificates or scrip negotiable or assignable?

Ans. They were assignable.

Ques. Was the land laid out into lots by the Omaha City Co. generally known as Scriptown?

Ans. It was a nickname, applied to it by individuals, to distinguish it from the old town plat.

By pl'ff att'y:

Quest. Is what you speak of as being called Scriptown embraced within the corporate limits of Omaha City?

Ans. It is.

Ques. How many of the lots deeded by the Omaha City Co.
612 to Mr. Shields, as stated in your previous testimony, are included in the W ½ of the SW¼, sec. 10, and the N ½ of the NW ¼ of sec. 15, town. 15 N., range 13 east?

Ans. According to the plat there are 10 lots, as I stated before; in the boundary pointed out by the receiver on a plat of the city there is 10 lots.

GEORGE ARMSTRONG.

The plaintiff counsel here offered documents, severally marked C, D, E, F, G, showing conveyance of lots [of lots] embraced within

Mr. Shields' pre-emption to and by him, both before and since his pre-emption.

The defendant object to deeds B, C, D, F, G, on the ground that being executed by the defendant, Shields, subsequent to his pre-emption, they are irrelevant to the matter now under examination.

The defendant here exhibited to the receiver warrantee deed from Thomas Hawes to Wellingham, of the SE ¼ sec. 10, town. 13, R. 10 E, dated 22d September, 1857.

It also appears from the records and files in the office of the receivers, and also in the office of the register, that the tract described in the above deed was pre-empted on the 22d day of September, 1857, by said Thomas Hawes, this being the same land referred to by the witness Hileman on yesterday as the tract on which defendant, Shields, now lives.

613 The plaintiff's counsel objects to the foregoing being made a part of the evidence, for the reason that no proof was offered showing the execution of the instruments, nor was there offered a certified copy of any record of the same.

Whereupon it was agreed upon by the parties that time should be given the defendants to produce a certified copy of said deed, and that the plaintiffs should have an opportunity of producing rebutting evidence to said deed, the time to be extended two weeks from to-day, which is, 25th May, 1857.

The defendants here produced W. Brown, who was put on his vori dire.

Ques. Are you directly or indirectly interested in this suit?
Ans. I do not think I am.

Mr. Brown, decided to be a competent witness, was duly sworn:

Ques. How long have you resided in this Territory?
Ans. A little over three years.

Ques. State what you know of the existence of a claim as-
614 sociation in this town from the 1st January, 1856, to the fall of 1857.

Ans. There was such an association; were in the habit of using force in thus protecting the claims of its members.

The plaintiff's counsel objects to the above, on the ground that it has no bearing on the question, and that the city of Omaha is not responsible for the habits of any club or association.

The receivers sustained the objection, but will permit it to be shown, if it can, that Mr. Shields was threatened.

The defendants took exceptious and retired from the court.

The certified copy of deed spoken of has been presented.

615 WASHINGTON, 15*th June*, 1859.

Hon. Jacob Thompson, Secretary of the Interior:

SIR: In the argument filed by me in support of the appeal taken from the decision of the Commissioner of the General Land Office in the

case of Robert Shields, I cited in support of the 6th ground of said appeal the decision of the Supreme Court of the U. S. in the case of Lytle *et al. vs.* The State of Arkansas, and I stated that there was no later decision of that court to the contrary, (having been misled by Mr. Brightly's classification of decissions under the pre-emption laws;) but I find that the case of Barnard's heirs *vs.* Ashley's heirs *et al.*, in 18 Howard, page 43, should have been cited and explained, and shown to have sustained the appeal taken in this case in the clearest manner. Such is the object of this paper, and I pray that it may be taken as a part of my argument on the said 6th point of the appeal.

On examining that case you will see that Judge Catron fully admits that when the register and receiver proceeded, according to the rules prescribed by the Commissioner of the Gen'l L. Office, their decision in cases arising under the pre-emption laws of 29th May, 1830, and of June 19th, 1834, was conclusive and final, and not subject to appeal; "on the facts which entitled the party to the right of preemption," before the act of the 4th July, 1836, "reorganizing the General Land Office;" but he argues to show that the said act of 4th July, 1836, "modifies the power of the register and receiver" so far as to authorize a review by the Commissioner in cases arising since
616 the date of the last-named act. But to authorize and justify such "suporvision" by the said commission under the act of 1836, according to this decision, it is necessary: (1st,) that the decision of the register and receiver should have been made upon ex-parte affidavits, whereas the proof in this case shows that the evidence was taken before the register upon published notice to all opposing claimants, so that it was not ex-parte according to this decision, as every opposing claimant, if any, had notice and an opportunity to contest; (2,) that the land should be "claimed by another," whilst the land claimed by Shields in this case is claimed by no other person under the pre-emption law; (3d,) that such contesting claim should be "founded on an opposing entry," whereas there is "no opposing entry" in this case, and it is shown by the evidence and admitted by the report of the receiver to the Commissioner that no one has interposed or has an opposing pre-emption claim to this land; (4th,) that in a case where the foregoing three requisites concur, the Commissioner has power, under the act of 4th July, 1836, aforesaid, to order a re-examination by the register and receiver, (both of them, they being the only officers authorized to act,) with notice to all parties to appear and contest, (where no such provisions had been given,) and that upon a report of the opinion of the register and receiver upon such reinvestigation the Commissioner had power to revise, under the authority of said act of 4th July, 1836, in cases arising under the acts of 1830 and 1834; that if a true construction of the act of 1836 does not authorize such a revision in such a case, "the practice under it for nearly 20 years could not be disturbed without manifest impropriety," whereas there has been no such 20 years' practice as supposed. The learned judge then shows that the cases in which it had been holden by the Supreme Court that the decision of the
617 register and receiver, under the acts of 1830 and 1834, could

not be revised, arose before the said act of 4th July, 1836. I think this will be found to be a precise and candid statement of the said decision; and upon it I have to remark:

I. That this decision fails in every requisite to justify the revision of the Commissioner in this case, under the act of 4th July, 1836, even if properly applicable as laid down in this decision of the Supreme Court; because: (1,) the record shows that the evidence of Mr. Shields in support of his pre-emption was not by "ex-parte affidavits," in violation of prescribed rules, but before the register, and the evidence shows a notice of his intention to pre-empt the land was published, and an opportunity thus given to adverse claimants, if there had been any, (which there were not,) to appear and contest; (2,) that the evidence and the receiver's report shows there was no adverse claimants entitled to notice, and who could lawfully claim the land; (3,) that there was no claim "founded on an opposing entry," (or even a claim of entry,) in the language of said decision; (4,) that there has been no such re-examination by the register and receiver as said decision requires, but only one by the receiver alone, in violation of law and instructions. The said decision calls for all these prerequisits to authorize the exercise of a revisory power by the Commissioner of the General Land Office. The clear and inevitable conclusion is that this decision furnishes no authority for the illegal, anomalous, and unprecedented action of the receiver alone in this case, or for that of the Commissioner, founded on his unauthorized report, but shows such action was illegal.

II. This decision does not touch the power of the register and receiver, or that of the Commissioner of the General Land Office,
618 under the act of the 4th Sept., 1841, under which alone this case arises and is to be decided, and being founded upon the most palpable error, it cannot with reason and justice be applied to this case. In a doubtful case, it is conceded that the executive offices may adopt a general principle, laid down under one law, and apply it to another, not from its binding force, but from a proper defence by the executive officers, to the judicial branch of the government. The dividing authority of this decision, even if its principles were applicable to this case, which they are shown not to be, only applies to cases arising under and after the passage of the act of 4th July, 1836, and in which the four prerequisites before named concur.

The error of this decision will be shown, beyond the power of all question, by the following statement:

The General Land Office was first organized as an office in the Treasure Department, by the act of 25th April, 1812, and certain duties devolved upon the Commissioner thereof to be exercised "under the direction of the head of the department." This act continued in force until the reorganization of the General Land Office by the act of 4th July, 1836, which is the same act of that date referred to by Judge Catron in the case of Barnard *vs.* Ashley, in 18 Howard. The 1st section of the act of 1812, creating the General Land Office, merely transferred certain executive duties under prexisting laws, in relation to public and private lands, previously performed by other

officers of the executive department, to the Commissioner of the General Land Office, and required him to perform them "under the direction of the head of the department," to wit, the Secretary of the Treasury, and also required him to perform such other duties as might thereafter be assigned to his office. But neither
619 this act, nor the act of 4th July, 1836, "reorganizing the General Land Office," and transferring the control from the Secretary of the Treasury to the President, created any new duties, nor gave any new powers to the said Commissioner. While the act of 1812 was in full force the pre-emption acts of 1830 and 1834 were passed, and gave power to the register and receiver to make decisions on pre-emption claims. This power was given by the 3d sect. of the act of 1830, and it was holden by the executive and judicial departments that the decisions of those officers, in cases within their jurisdiction were not subject to review by the Commissioner of the Gen'l Land Office, but were final. On the 4th July, 1836, Congress passed an act "reorganizing the General Land Office." The 1st section, quoted in said decision in 18 Howard, gave no new powers to the Comm'r, but the same duties were imposed as by the 1st section of the act of 1812, which were to be exercised "under the direction of the President of the United States," and not "under the head of the department," to wit, the Secretary of the Treasury.

On examining that act carefully you will find that it did not undertake or profess to give by its own terms and provisions any new powers to the said Commissioner, but that it simply provided that such powers as had been given to him by previous laws, or as should be given him by subsequent laws, should be exercised "under the direction of the President of the United States" instead of the Secretary of the Treasury. Read and criticise this 1st section of the act of 4th July, 1836, and you can make nothing else of it. The language of the act is, "executive duties now prescribed, or which may hereafter be prescribed by law," and necessarily means such as had been previously or should thereafter be prescribed by law, and
620 cannot legally be construed as conferring any new powers or duties. The only object was to transfer the direction and control in the performance of such duties from the Secretary of the Treasury to the President. This is literally the plain and obvious meaning of the law.

The history of the action which took place under the act of 1836, "reorganizing the General Land Office," and under the pre-emption acts of 29th May, 1830, and of 19th June, 1834, which was not presented to the Supreme Court in the case of Barnard & Ashley, would have prevented this palpable misconstruction of the act of 4th July, 1836. This history is as follows:

The question whether the decision of the register and receiver were subjected to appeal or review by the Commissioner of the General Land Office, under the pre-emption acts of 1830 and 1834 aforesaid, was raised and considered in May and June, 1836. General Jackson was then President, when, by the act of 1812 aforesaid, creating the General Land

Office, the Commissioner was required to act "under the direction of the head of the department," to wit, the Secretary of the Treasury. General Jackson was appealed to in a case involving this question to see that the laws were "faithfully executed," which was his sworn constitutional duty, as to all heads of departments as well as officers of the federal government. In May, 1836, this question was deliberately considered by Gen. Jackson, his Attorney General, Butler, and his Secretary of the Treasury, Mr. Woodbury, subject to whose direction the Commissioner of the General Land Office was then required to act, and the 9 principles referred to in my arguments of the 8th instant were then drawn up and sent to the Commissioner of
621 the General Land Office for his government, and at the bottom of this paper is the following statement:

The preceding rules, numbered from 1 to 9, have been prepared by the Secretary of the Treasury, with the advice of the Attorney General, for the government of the Land Office in respect to pre-emption cases. Approved this 6th day of May, 1836. (Signed,) Andrew Jackson.

This paper was sent to the General Land Office, and long since 1836 was published, under the auspices of the said office, by Congress, and promulgated to the people of the U. S. as the law, having as an authorized and legal instruction the force of law, in cases to which it is applicable.

It was approved and promulgated, and became binding on the Commissioner of the General Land Office as the act both of the Secretary and the President, and is applicable to the act of 4th September, 1841, as well as to the acts of 1830 and 1834; and so far as I know and believe, has never been superseded by any other "direction" either by the Secretary or the President, either under the acts of 1830 and 1834, the act of 4th July, 1836, 1838, 1840, or 1841. If not, it is as binding as statute law. Gen. Jackson was President when the act of 4th July, 1836, was passed, making the action of the Commissioner, in whatever duties that law imposed upon him, subject to the direction of the President of the United States. These rules had been approved by him and sent to the Commissioner of the General Land Office for his government nearly simultaneously with the passage of that act, and were designed by him to be operative under that act, as is proved by his failure and that of his successors to sub-
622 stitute others in their place, and as is further proved by the publication and promulgation of said rules, and none others, as aforesaid.

By examining these rules, (which I append,) the Hon. Secretary of the Interior will find they are drawn with the greatest care, and provided for every case that can possibly arise under any of the pre-emption laws upon the question now under consideration. Had there been presented to the consideration of the Supreme Court in the case of Barnard and Ashley, the error I have pointed out, and I trust demonstrated, would undoubtedly have been avoided. The act of 4th July, 1836, as copied by the court in its said decision, expressly states that the duties of the Commissioner, whatever they

may be under the said act, are to be subject to "the direction of the President of the United States," and he could of course exercise no power upon the question under consideration but in conformity to such directions, and the decision cannot be legally construed to declare that he could. That court has again and again declared that instructions, when authorized by act of Congress, are as binding statute law. These cases will be pointed out, if desired.

III. But I beg the Hon. Secretary to see and remember, that if the act of 4th July, 1836, so far qualified the power of the Commissioner or of the register and receiver, under the pre-emption laws of 29th May, 1830, and of 19th June, 1834, (because it was a later law,) as to give the Commissioner a revisory power over the decision of the register and receiver, still the identical provision of the act of 29th May, 1830, was re-enacted in the 12th section of the act of 4th September, 1841, and necessarily restores the power of the reg-
623 ister and receiver as given them by the acts of 1830 and 1834.

It is the later law, and necessarily repeals all previous provisions in conflict with it. If this is not so there is certainly nothing in the decision of the Supreme Court in the case of Barnard and Ashley, to the effect that a later law (that of 1836, 4th July) repeals or qualifies the previous acts, and nothing in the rules of Divorsis for the construction of States, and nothing in any elementary work or judicial decision with which I am acquainted. I will produce authority if desired, but am not permitted to presuppose that they can be required on so plain a principle. I would here respectfully repeat my request, that if the Hon. Secretary entertains any doubt as to the correctness of the 6th or 7th points of the appeal, that he will refer the questions to the Attorney General of the U. S. for an opinion.

☞I would also respectfully beg the Hon. Secretary to note the fact that the 11th section of the act of 4th September, 1841, expressly points out the specific cases and the precise mode in which an appeal may be taken from the register and receiver to the Secretary of the Interior, (or Treasury;) and the 10th section of the act of 12th June, 1858, when it may be taken to the Commissioner of the General Land Office, to wit, where and only where two or more persons shall have settled on the same quarter section of land, and where questions as to the right of pre-emption arising between different settlers thereon come up for decision. This necessarily excludes appeals in all cases. "Expressum fecit cessare tacitum, expressio unius est [est] exclusio alterius." These are axioms of law strictly applicable.

624 ☞ This provision of the 11th section of the act of 1841 covers by express legislation the very cases, and all the cases covered by the decision of the Supreme Court in the case of Barnard and Ashley in 18 Howard.

I append to and hand with this paper extracts from the acts of 1812, (25th April, 4th July, 1836, 29th May, 1830, and 4th September, 1841,) also from the decision in 18 Howard, so far as applicable to this case.

☞ I also append an extract from the decision of the Supreme

Court of the U. S. in the case of Cunningham *vs.* Ashley *et al.*, 14 Howard, pp. 384, 385, showing a case where the land claimed for pre-emption, like that claimed by Mr. Shields in this case, had been surveyed and laid out into lots, blocks, and streets, by a company, where many lots had been sold and where the improvement was alleged as in this case (but not truly) to have been made, with reference to such lots and blocks, and in which the Supreme Court overruled all these objections, and decided that they constituted no objection to the claim, and that the mere survey and laying out of public lands of the U. S. into blocks and lots for a town site, there being no improvement or settlement on the same, were illegal and void acts, and no bar to a pre-emption claim. The facts are strikingly analogous to those reported by the receiver in this case as obsta-
625 cles to the entry of Shields.

I also add a copy of the instructions to the Commissioner of the General Land Office, approved by President Jackson as aforesaid, to save you the trouble of reference, and am,

Very respectfully, your obedient servant,

CHAS. E. SHERMAN,
Att'y, &c.

Extracts from the decision of the Supreme Court in the case of Barnard's heirs vs. Ashley's heirs et al., 18 *How., pp.* 44, 45.

In cases arising under the pre-emption laws of the 29th of May 1830, and of the 19th of June, 1834, the power of ascertaining and deciding on the facts which entitled a party to the right of pre-emption was vested in the register and receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. But even under these laws, the proof on which the claim was to rest was to be made "agreeably to the rules to be prescribed by the Commissioner of the General Land Office," and if not so made, the entry would be suspended, when the proceeding was brought before the Commissioner by an opposing claimant.
626 In cases, however, like the one before us, where an entry had been allowed on ex-part affidavits which were impeached, and the land claimed by another founded on an opposing entry, the course pursued at the General Land Office was to return the proofs and allegations in opposition to the entry to the district office, with instructions to call all the parties before the register and receiver, with a view of instituting an inquiry into the matters charged, allowing each party, on due notice, an opportunity of cross-examining the witnesses of the others, each being allowed to introduce proofs; and on the close of the investigation the register and receiver were instructed to report the proceedings to the General Land Office, with their opinion as to the effect of the proof and the case made by the additional testimony. And on this return the Commissioner does in fact exercise a supervision over the acts of the register and receiver. This power of revision is exercised by virtue of the act of July 4th, 1836.

§. 1. Which provides "that from and after the passage of this act the executive duties now prescribed or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the
627 government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States." The necessity of "supervision and control" vested in the Commissioner, acting under the direction of the President, is too manifest to require comment, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish by ex-part affidavits, cultivation, and possession of particular quarter sections of land, where the fact is untrue.

That the act of 1836 modifies the powers of registers and receivers to the extent of the Commissioner action in the instances before us, we hold to be true. But if the construction of the act of 1836 to this effect were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety. The case relied on, of Wilcox *vs.* Jackson, 13 Pet. 511, was an ejectment suit commenced in February, 1836; and as to the acts of the register and receiver in allowing the entry in that case, the Commissioner had no power of supervision such as was given to him by the act of July 4th, 1836, after the cause was in court.

In the next case, 9 Howard, 333, all the controverted facts on which both sides relied had transpired, and were concluded before the act of July 4, 1836, was passed, and therefore its construc-
628 tions as regards the Commissioner's powers, under the act of 1836, was not involved, whereas in the case under consideration the additional proceedings were had before the register and receiver in 1837, and were subject to the new powers conferred on the commissioner.

Extract from 14 *Howard.*

In the case of Cunningham *vs.* Ashley *et al.*, 14 Howard Reports, page 384-'5, the court uses the following language:

"It is objected that Cunningham's improvements, though on the quarter section claimed, are limited by the boundaries of a certain square or lots within the city of Little Rock," and that consequently he cannot claim a pre-emption for the quarter section.

On the 20th Nov. 1821, certain individuals, assuming to be owners and proprietors of the northeast fractional quarter of section number three, and of fractional section No. two of township number one, north of the base line in range number 12 west, entered into a deed of assurance in which they agreed to lay out the town of Little Rock, specifying the streets and alleys and making certain donations of public squares and lots for public purposes. This plat appears to have been surveyed so as to em-

629 brace the quarter section in controversy. In their answers the defendants specify a number of lots sold in the southeast quarter, and they allege the quarter part of it has been sold in lots. The proprietors in their deed say that they extended the plat to adjoining lands not owned by them. This survey of lots in the southeast quarter of section three, if made without authority, cannot embarrass the complainant's right. The New Madrid locations being out of the case, should the right of the complainant be sustained against the legal title of the defendants, the surveys must be considered as void. The town was incorporated in 1825, and by the act of 1827, the corporation was extended so as to embrace the whole of the town-plat. When the improvements of the complainant was commenced the southeast quarter was in its natural state, unchanged by any improvement?

630 *Extract from acts of Congress.*

The General Land Office was first organized by and under the act of 25th April, 1812, (2 Stats. at Large. p. 716.) Section 1st provides, that there shall be established in the Department of the Treasury an office to be denominated the General Land Office, the chief officer of which shall be called Commissioner of the General Land Office, whose duty it shall be, under the direction of the head of the department, to superintend, execute, and perform all such acts and things touching or respecting the public lands of the United States and other lands patented or granted by the United States, as have heretofore been directed by law, to be done or performed in the office of the Secretary of State, of the Secretary of the Treasury, and of the Secretary of War, or which shall hereafter be assigned to the said office.

The act of July 4th, 1836, (5 Stats. at Large, p. 107,) entitled "An act to reorganize the General Land Office." Section 1st provides "that from and after the passage of this, the executive duties now prescriben, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands; and also, such as relate to private claims of land, and the issuing of patents for all grants
631 of lands under the authority of the United States shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States."

Section II of the same act provides:

Sec. II. That such provisions of the act of the 25th of April, in the year one thousand eight hundred and twelve, entitled "An act for the establishment of a General Land Office in the Department of the Treasury," and of all acts amendatory thereof, as are inconsistent with the provisions of this act, be, and the same are hereby, repealed.

The 3d section of the act of 29th May, 1839, is as follows:

Sec 3. That prior to any entries being made under the privileges

given by this act, proof of settlement or improvements shall be made to the satisfaction of the register and receiver of the land district in which lands may lie, agreeably to the rules to be prescribed by the Commissioner of the General Land Office for that purpose, which register and receiver shall be each entitled to recive fifty cents for his services therein, and that all assignments and transfers of the right of pre-emption given by this act, prior to the issuance of patents, shall be null and void. [Vid 12 sec. al. 141, below,] (4th Stat. at L., p. 421.)

The 11th and 12th sections of the act of 1841 are as follows: (5 Stats., p. 546.)

632 SEC. 11. And be it further enacted: That when two or more persons shall have settled on the same quarter section of land, the right of pre-emption shall be in him or her who made the first settlement, provided such persons shall conform to the other provisions of this act, and all questions as to the right of pre-emption arising between different settlers, shall be settled by the register and receiver of the districts within which the land is situated, subject to an appeal to and a revision by the Secretary of the Treasury, (interim) of the United States. [Vid. 10, sec. act 12, June, '58.]

SEC. 12. And be it further enacted: That prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvements thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may be, agreeably to such rules as shall be prescribed by the Secretary of the Treasury (interim,) wh' shall each be entitled to receive fifty cents from each applicant for his services, to be rendered as aforesaid; and all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void.

633 *Rules in relation to pre-emption cases.*

TREASURY DEPARTMENT.
May 6th, 1836.

1. Where the register and receiver do not make an absolute decision on the claim, but report the case for the advice of the Commissioner, he should, at an early day, give them advisory instructions in respect to it, in conformity to the existing rules, or, if there be none applicable to the case, then according to such special direction as may be given by the Secretary of the Treasury.

2. Where those officers shall have made an absolute decision, and a certificate of purchase shall have been issued, the evidence shall be carefully examined, for the purpose of ascertaining whether the case was without their jurisdiction, and whether they have proceeded regularly, as required by law and the regulations.

3. Where it shall appear that the officers had no jurisdiction, or have proceeded irregularly their decisions shall be treated as nul-

lities, and returned to them with a statement of the particular objections.

4. Where the officers have jurisdiction, and have proceeded
634 regularly, the Land Office has no power to reverse their decisions; but in such cases patents will isssue, of course, unless there is good to believe, from the evidence reported or other information that the decision was obtained by fraud, or founded in material error of fact or of law, in which case the patent shall be suspended, as hereinafter provided.

5. If the supposed error be prejudicial to the United States, the patent shall be withheld until the direction of Congress or the decision of some competent judicial tribunal shall be obtained, or the claimant shall produce to the Commissioner satisfactory evidence to remove the objection.

6. If there be two or more opposing claimants, and the supposed error be prejudicial to one or more of them, and it is not explained to the satisfaction of the Commissioner, the patent shall be withheld, at the instance of the party aggrieved, for a reasonable time, to enable him to institute a suit to determine the right, and after such suit shall be commenced, until the determination thereof.

7. Where there is but one claimant, and the decision is against him, and there is good reason to believe that such decision was erroneous and unjust, the case shall be returned to the land officers for their re-examination, with suitable advisory instructions.

8. Whenever the special direction of the Secretary of the
635 Treasury shall be required, the facts of the case shall be briefly reported by the Commissioner, with a distinct statement of the points in respect to which direction is required.

9. The pressure of business in the Land Office being such as to prevent the early issue of patents, the Commissioner thereof shall, after proper examination in contested or doubtful cases, give a certificate to the parties, stating whether sufficient objections do or do not appear to the issue of a patent in any particular case where it is reached in due course for that purpose.

The preceding rules, number from 1 to 9, have been prepared by the Secretary of the Treasury, with the advice of the Attorney General, for the government of the Land Office in respect to preemption cases.

Approved this 6th day of May, 1836.

ANDREW JACKSON.

Supplemental argument in the case of Robert Shields, with extracts from decisions of the Supreme Court, and from acts of Congress.

636 *Shields to Smith.*

This indenture, made this twenty-sixth day of January, one thousand eight hundred and fifty-eight, between Robert Shields, of Omaha, Nebraska, and Margaret J., his wife, parties of the first part, and E. V. Smith, party of the second part, witnesseth, that the said parties

of the first part, for and in consideration of the sum of three thousand dollars, to them paid, have sold and confirmed unto the said party of the second part the following described premises, and all the appurtenances thereunto belonging viz: The undivided half of the west half of the southwest quarter of section (10,) ten, and the north half of the northwest quarter of section fifteen, (15,) in township fifteen, (15,) north of range thirteen (13) east, leaving and reserving therefrom ten lots, in block one hundred and twenty-eight, (128.)

And the said parties of the first part do hereby covenant with the said party of the second part that they are the legal owners and holders of said premises; that the same are free and clear of all incumbrances whatsoever; that they will forever warrant and defend the same unto the said second party, his heirs and assigns, forever against the legal claims of all persons whomsoever.

In witness whereof the parties of the first part have here-
637 unto set their hands and seals the day and year first above written.

[SEAL.] ROBERT SHIELDS.
[SEAL.] MARGARET J. SHIELDS.

Signed in the presence of—

TERRITORY OF NEBRASKA, *Douglas County, ss:*

On this 27th day of January, 1858, personally appeared before me, a notary public, Robert Shields and Margaret J., his wife, to me known to be the persons who executed the above instrument as grantors, and acknowledged the same to be their voluntary act and deed.

[SEAL.] ALFRED SAYER,
Notary Public for Douglas Co., N. T.

Filed and recorded January 28th, 1858, at 11½ a. m. Attest.
THOMAS O'CONNER, *Reg's.*

OMAHA, N. T., *May 10th*, 1858.

I hereby certify that the above is a correct copy of a certain conveyance from Shields to Smith, as recorded on the records of Douglas county, Nebraska Territory.

THOMAS O'CONNER,
Register of Deeds.

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, J. W. Paddock, clerk of the Distrit Court in and for said county, do hereby certify that the annexed instrument is executed and
638 proved, or acknowledged, in due form, according to the laws of the Territory of Nebraska, to entitle it to be recorded therein; also, that Thomas O'Conner, whose certificate is thereto attached, was, at the time of making such certificate, a register of deeds in and for county, duly qualfied and authorized to take the same. And I further certify that I am well acquainted with the hand-

writing of the said Thomas O'Conner, and verily believe the signature to the said certificate is genuine.

Witness my hand and seal of said court of Omaha this 11th day of May, A. D. 1858.

J. W. PUDDOCK, *Clerk.*
By E. B. CHANDLER, *Deputy.*

[First District Court of Nebraska seal]

Exhibit "V."

Pre-emption certificate, No. 996.

639 The United States of America, to all whom these presents shall come, greeting:

Whereas Robert Shields, of Douglas county, Nebraska, has deposited in the General Land Office of the United States a certificate of the register of the land office at Omaha, whereby it appears that full payment has been made by the said Robert Shields, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of public lands," for the west half of the southwest quarter of section ten, and the north half of the northwest quarter of section fifteen, in township fifteen north of range thirteen east, in the district of land subject to sale at Omaha, Nebraska, containing one hundred and sixty acres, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tracts have been purchased by the said Robert Shields:

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant unto the said Robert Shields, and to his heirs, the said tract above described, to have and to

640 hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said Robert Shields, and to his heirs and assigns forever.

In testimony whereof, I, Abraham Lincoln, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-seventh.

By the President:

ABRAHAM LINCOLN.
By W. O. STODDARD, *Sec'y.*
J. M. GRANGER,
Recorder of the Gen'l Land Office.

[SEAL.]

Recorded vol. 3, page 233.

641 No. 996. RECEIVER'S OFFICE AT OMAHA CITY,
Nov. 21st, 1857.

Received from Robert Shields, of Douglas county, Nebraska, the sum of two hundred dollars and cents; being in full for the west ½ of southwest ¼, section ten, and north ½ of northwest quarter of section No. fifteen, in township No. 15 N. of range No. 13 E., containing one hundred and sixty acres and hundredths, at $1 25-100 per acre.

ADDISON R. GILLMAN, *Receiver.*

$200 11-100. Pre-emption act, 1841.

Endorsed: G. L. Office: Cancellation rescinded. Entry approved and filedfor patenting, S. M. decision of the Secretary of the Interior, under date of 13th December, 1861. ———, sec'ry.

☞ For the papers in this case see special files in P. E. division. Noted the rescinding of cancellation. Dec. 20, '61.

G. L. O. See letter to Sec'y Interior, Feb. 1, 1860, and Sec'y's reply, May 5th, 1860. Also see letters to R. and R., May 15th, 1860.

B. W. L. Vol. 3, page 233. Feb. 24, 1863.

Ex. Pre. Div., Feb'y 20th, 1863: This certificate having been held up for a re-examination of the case, is this day relieved from suspension and filed for patenting. H. J. G.

642 No. 996. LAND OFFICE AT OMAHA,
November 21, 1857.

It is hereby certified, that in pursuance of law, Robert Shields, Douglas county, State of Nebraska, on this day purchased of the register of this office the lot or west half of southwest quarter of section N. ten, and the north half of northwest quarter of section No. fifteen, in township No. fifteen N. of range No. thirteen E., containing one hundred and sixty acres, at the rate of one dollar and twenty-five cents per acre, amounting to two hundred dollars and cents, for which the said Robert Shields has made payment in full as required by law.

Now, therefore, be it known, that, on presentation of this certificate to the Commissioner of the General Land Office, the said Robert Shields shall be entitled to receive a patent for the lot above described.

JOHN A. PARKER, *Register.*

Endorsed: Pre-emption, Oct. 1841. G. L. O. Cancelled. See letter to R. R., Jan. 12, 1859. X. Reinstated.

643 *Affidavit required of pre-emption claimant.*

I, Robert Shields, claiming the right of pre-emption under the provisions of the act of Congress entitled "An act to appropriate the proceeds of the sale of the public lands, and to grant pre-emp-

tion rights," approved September 4, 1841, to the north half of the N. west quarter of section number fifteen, and west half of south-west quarter of sec. No. 10, of township number fifteen north, of range number 13 east, subject to sale at the land office at Omaha city, Nebraska Territory, do solemnly swear that I have never had the benefit of any right of pre-emption under this act; that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which I may acquire from the government of the United States should enure, in whole or in part, to the benefit of any person except myself.

ROBERT SHIELDS.

I, John A. Parker, register of the land office at Omaha city, Nebraska Territory, do hereby certify that the above affidavit was taken and subscribed before me, this day of , A. D. 1857.

JOHN A. PARKER, *Register.*

644 And thereupon, afterwards, to wit, on the 1st day of July, A. D. 1867, the complainant, by his attorney, came into the Circuit Court of the United States within and for the district of Nebraska, and filed a motion which is in words and figures following, to wit:

United States Circuit Court, District of Nebraska.

AARON ROOT
vs.
ROBERT SHIELDS *et al.*

Now comes the complainant in the above-entitled cause by J. M. Woolworth, his solicitor, and moves the court to place said cause on the calendar for trial at this term of this court.

J. M. WOOLWORTH, *Compl't's Sol.*

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says, that the above-entitled cause arises under the laws of the United States, and was
645 pending in the Supreme Court of the Territory at the time of the admission of Nebraska into the Union.

J. M. WOOLWORTH.

Sworn to and subscribed before me, this 1st day of July, 1867.

E. B. CHANDLER, *Clerk.*

And on the back of said motion are the words and figures following, to wit:

"No. 57. Cer't Ct. Root *v.* Shields *et al.* Motion J. M. Woolworth, compl'ts sol. Filed July 1st, 1867. E. B. Chandler, clerk."

And thereupon, afterwards, to wit, on the 8th day of July, A. D. 1868, an order was made by the Circuit Court of the United States for the district aforesaid in said cause, which appears of record in words and figures following, to wit:

AARON ROOT
vs.
ROBERT SHIELDS.

Ordered, that the above-entitled cause be, and the same is, hereby removed from the District Court of the State of Nebraska into
646 the Circuit Court of the United States for the District of Nebraska, and that this order entered as of the date of the 1st day of July, 1867.

And thereupon, afterwards, to wit, on the 12th day of July, in the year aforesaid, an affidavit was filed in said cause which is in words and figures following, to wit:

In the United States Circuit Court, district of Nebraska.

AARON ROOT
vs.
JAMES D. TEST *et al.*

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn says, that he is the solicitor for complainant in the above-entitled cause; that the said cause was duly commenced in the District Court for the first judicial district of the late Territory of Nebraska, on the first day of May, 1863; that James D. Test, Jefferson P. Cassady, John T. Baldwin, and Nathan P. Dodge, answered the said bill jointly, and Elrick Smith and Evert V. Smith answered the same, and the same was taken as con-
647 fessed as against the other defendants therein; that replications to said answers having been filed, and proofs taken, a decree was rendered in said court from which said defendants, Test, Cassady, Baldwin, and Dodge, appealed to the Supreme Court of [of] said Territory; that the said cause was on said appeal pending in said court on the day and at the time of the admission of said State of Nebraska into the Union; that the defendants therein were all residents in and citizens of the State of Iowa, and the plaintiff was a resident in and citizen of the State of Nebraska, and so were on the day first aforesaid; that said suit is brought to recover the legal title

to lands in said State, which on said day were, and now are, of the value of five hundred dollars and over.

J. M. WOOLWORTH.

Sworn to and subscribed before me this 12th day of July, 1867.

E. B. CHANDLER, *Clerk.*

648 On the back of said affidavit are the words and figures following, to wit:

"U. S. C't C't, Neb. In ch'y. Root *v.* Test, &c. Aff't filed July 12th, 1867. E. B. Chandler, clerk."

And thereupon, afterwards, to wit, at the November term of said Circuit Court, the Honorable Samuel F. Miller, the judge presiding, said cause came on to be heard, and on the 11th day of November, A. D. 1867, a decree was entered therein, which appears of record, in words and figures following, to wit:

At a Circuit Court of the United States holden at the City of Omaha, for the district of Nebraska, on the eleventh day of November, one thousand eight hundred and sixty-seven.

Present: The Honorable Samuel F. Miller, judge, &c.

AARON ROOT, complainant,
vs.
JAMES D. TEST, JEFFERSON P. CASSADY, JOHN T. Baldwin, Nathan P. Dodge, Grenville M. Dodge, and Elrick Smith, impleaded with other defendants.

This cause having been removed into this court from the
649 Supreme Court of the late Territory of Nebraska, came on to be heard upon the proceedings and proofs, and was argued by Mr. Woolworth for the complainant, and by Mr. Briggs for the defendants, and it is now here declared that the premises in question in this cause were not subject to entry at the United States land office, under the pre-emption law entitled in the proceedings, and approved September 4, 1841, at the time when it is on behalf of the defendants claimed that the alleged right thereto of said Robert Shields attached to said lands to wit, September, one thousand eight hundred and fifty-seven, the said lands at that time being included within the corporate limits of the city of Omaha, and therefore that the entry of said lands by said Shields was illegal and void, and that the defendants herein claiming under him are not bona-fide purchasers, and that the title acquired or held by them under and by virtue of the letters patent of the government is held by them in trust for said complainant. It is therefore, ordered, adjudged, and decreed, that the said defendants, within thirty days from the date hereof, make to the said complainant their certain deed or deeds of conveyance, by them to be duly executed and acknowledged, conveying said premises to said complainant, and that in case they
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make default in that behalf, that E. B. Chandler, who is hereby made and appointed a master specially for the purpose, make and execute such conveyance in the stead of said defendants, for which he is allowed ten dollars, to be taxed in the costs; and it is further ordered and decreed that the said defendants pay to said complainant his costs in this behalf expended to be taxed. The premises to be affected by this decree are known and described as follows; that is to say, lots one, two, three, four, five, six, seven, eight, nine, ten, and eleven, in block three, and out-lots eleven, twelve, thirteen, fourteen, and fifteen, in the North Omaha plat number one.

And thereupon the said defendants prays an appeal to the Supreme Court, which is allowed, and the bond for costs ordered to be in the penal sum of $500.

SAM. F. MILLER, *Judge.*

On the back of said decree are the words and figures following, to wit:

651 "No. 57. U. S. Circuit Court. Aaron Root *v.* James D. Test *et al.* Decree. J. M. W., sol. Filed Nov. 12th, 1867. E. B. Chandler, clerk."

And thereupon, afterwards, to wit, on the 15th day of November, in the year last aforesaid, a bond was filed in the office of the clerk of said court, which is in the words and figures following, to wit:

In Circuit Court of United States for district of Nebraska.

AARON ROOT, complainant,
vs.
ROBERT SHIELDS *et al.*, defendants.

Know all men by these presents, that we, James D. Test, Jefferson P. Cassady, John T. Baldwin, and Nathan P. Dodge, defendants, as principals, and John J. Redick, and Clinton Briggs, as sureties of said district, are held and firmly bound unto Aaron Root, complainant, in the sum of two thousand dollars, to be paid to said Root, his executors and administrators, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally
652 and each of our heirs, executors and administrators, firmly by these presents.

Dated November 12th, A. D. 1867.

Whereas the above-named defendants have appealed from the final decree of the said Circuit Court made in this cause to the Supreme Court of the United States, to the end that said decree may be reversed:

Now, therefore, the condition of this obligation is such, that if the said defendants shall prosecute said appeal to effect and answer all

damages and costs if said decree be not reversed, then the obligation to be void, otherwise of force and virtue.

JAMES D. TEST,
JEFFERSON T. CASSADY,
JOHN T. BALDWIN,
NATHAN P. DODGE,
By REDICK & BRIGGS,
Their Attorneys.
CLINTON BRIGGS,
JOHN J. REDICK, *Sureties.*
SAM. F. MILLER, *Judge.*

Approved, Nov. 12, 1867.

On the back of said bond are the words and figures following, to wit:

653 "No. 57. Circuit Court of the United States, district of Nebraska. Aaron Root *vs.* Robert Shields *et al.* Bond. Filed Nov. 15th, 1867. E. B. Chandler, clerk. Redick and Briggs, att'ys for def'ts."

654 UNITED STATES OF AMERICA, *District of Nebraska, ss:*

I, E. B. Chandler, clerk of the Circuit Court of the United States, within and for the district of Nebraska, do hereby certify that the within and foregoing is a full, true, and perfect transcript of all the original papers and record entries in the aforesaid cause, wherein Aaron Root is complainant, and James D. Test and others are defendants, as the same now appears on file and of record in my office.

Witness my hand and the seal of said court at Omaha, in said district, this 26th day of March, A. D. 1868.

[SEAL.] E. B. CHANDLER, *Clerk.*